(1)

Supreme Court, U.S.
FILED

05-36 JUL 5 - 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GOLDEN PACIFIC BANCORP,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK A. PERRY
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioners

QUESTION PRESENTED

When the federal government closes a bank and liquidates its assets, "the remainder of the proceeds, if any, shall be paid over to the shareholders of such association . . . ." 12 U.S.C. § 194. In this case, the government closed a bank owned by petitioner and liquidated its assets, but engaged in a series of sham transactions to avoid distributing the remainder of the proceeds to petitioner. Did the court of appeals err in concluding that petitioner cannot maintain an action for equitable relief against a government receiver that blatantly violates its fiduciary duties?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding in the court below. Golden Pacific Bancorp, a privately held corporation, owns more than 90 percent of the shares of Golden Pacific National Bank, a federally chartered financial institution closed in 1985 by order of the Comptroller of the Currency.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
I. The Court Of Appeals Erroneously Exempted A Government Receiver From Equitable Remedies Available Against Private Receivers	9
II. The Court Of Appeals Erroneously Concluded That Petitioner Lacks Standing To Pursue Equitable Remedies Against The Government Receiver	15
CONCLUSION	20

TABLE OF AUTHORITIES

Pages

CASES

Atherton v. *FDIC*, 519 U.S. 213 (1997) 14

Clark v. *Daby*, 751 N.Y.S.2d 622 (App. Div. 3d Dep't 2002) 12

Cohen v. *Gross*, 316 F.2d 521 (3d Cir. 1963) 17

Crompton-Richmond Co. v. *United States*, 311 F. Supp. 1184 (S.D.N.Y. 1970) 16

Dolmetta v. *Unitah Nat'l Corp.*, 712 F.2d 15 (2d Cir. 1983) 12

FDIC v. *Delgau*, 207 F.3d 153 (3d Cir. 2000) 14

FDIC v. *Houde*, 90 F.3d 600 (1st Cir. 1996) 14

FDIC v. *McFarland*, 243 F.3d 876 (5th Cir. 2001) 14

Federal Fin. Co. v. *Hall*, 108 F.3d 46 (4th Cir. 1997) 14

Golden Pacific Bancorp v. *Clarke*, 837 F.2d 509 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988) 2

Golden Pacific Bancorp v. *United States*, 15 F.3d 1066 (Fed. Cir.), *cert. denied*, 513 U.S. 961 (1994) 3

Gollust v. *Mendell*, 501 U.S. 115 (1991) 18

Herring v. FDIC, 82 F.3d 282 (9th Cir. 1995), *cert. denied*, 515 U.S. 1027 (1996) 17, 18

In re Ivan F. Boesky Sec. Litig., 36 F.3d 255 (2d Cir. 1994) 13

James Madison Ltd. v. *Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996) 18

Lake Minnewaska Mountain Houses, Inc. v. *Rekis*, 686 N.Y.S.2d 186 (App. Div. 3d Dep't 1999) 12

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 19

Mosser v. *Darrow*, 341 U.S. 267 (1951) 11

New Orleans Pub. Serv., Inc. v. *Council of City of New Orleans*, 491 U.S. 350 (1989) 9, 19

Nguyen v. *United States*, 539 U.S. 69 (2003) 19

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) ..... *passim*

People v. *Am. Loan & Trust Co.*, 65 N.E. 200 (N.Y. 1902) 12

Rambo v. *United States*, 492 F.2d 1060 (6th Cir. 1974) 17

Soam Corp. v. *Trane Co.*, 608 N.Y.S.2d 177 (App. Div. 1st Dep't 1994) 13

Valley Forge Christian College v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982) 19

Vinlis Constr. Co. v. *Roreck*, 314 N.Y.S.2d 8 (N.Y. 1970) 13

Wallis v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966) 14

In re Western Trading Co., 340 F. Supp. 1130 (D. Nev. 1972) 17

STATUTES

12 U.S.C. § 1821 2
12 U.S.C. § 1821(c) 3
12 U.S.C. § 1821(g) 12
12 U.S.C. § 191 ..... 2, 3
12 U.S.C. § 194 ..... *passim*
26 U.S.C. § 6203 17
26 U.S.C. § 6404 16
26 U.S.C. § 7507 ..... 2, 5, 16
28 U.S.C. § 1254(1) 1
28 U.S.C. §§ 2671-80 11
N.Y.C.P.L.R § 5004 (McKinney 1963) 12

OTHER AUTHORITIES

Black's Law Dictonary 3 (8th ed. 2004) 16
L. Carroll, *Through the Looking Glass* (1871) 17
I Palmer, *Law of Restitution* § 2.11 (1978) 8, 13
Restatement (Second) of Agency § 469 (1958) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Golden Pacific Bancorp, for its own account and derivatively on behalf of Golden Pacific National Bank, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 375 F.3d 196. A previous opinion of the court of appeals (App., *infra*, 73a-90a) is reported at 273 F.3d 509. The underlying orders of the district court (App., *infra*, 19a-35a; 36a-72a; 91a-104a; and 105a-112a) are not officially reported, but are available at 2003 U.S. Dist. LEXIS 10982; 2002 U.S. Dist. LEXIS 24961; 2000 U.S. Dist. LEXIS 8240; and 1997 U.S. Dist. LEXIS 15537, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2004. A timely petition for rehearing was denied on February 2, 2005. App., *infra*, 113a-114a. On April 25, 2005, Justice Ginsburg extended the time within which to file this petition to and including July 5, 2005. No. 04-A909. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As of 1985, 12 U.S.C. § 194 provided:

> **§ 194. Dividends on adjusted claims; distribution of assets**
>
> From time to time, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims pre-

> viously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Pursuant to this Court's Rule 14.1(f), the pertinent text of the following statutes is set forth in the Appendix, *infra*, at 119a-122a: 12 U.S.C. §§ 191 & 1821 (1985); and 26 U.S.C. § 7507 (1985).

STATEMENT

In 1985, the federal government seized a bank owned by petitioner. After all depositors and other creditors were paid in full (and after the government receiver paid itself approximately $14.3 million in alleged liquidation expenses), the receivership estate held net assets exceeding $15 million. Federal law requires in such situations that the receiver "pa[y] over to the shareholders" any "remainder of the proceeds." 12 U.S.C. § 194. The government receiver, however, refused to return this money to petitioner—its rightful owner. Instead, the government receiver chose to keep the money for itself through a series of sham transactions unheard of in the long history of federal banking regulation. Petitioner sued, alleging that the government receiver's flagrant self-dealing gave rise to equitable claims for monetary relief. The district court ultimately granted summary judgment to the government, and the court of appeals affirmed. This petition follows.

1. Petitioner Golden Pacific Bancorp owned more than 90% of the stock of Golden Pacific National Bank ("Bank"), a federally chartered institution. App., *infra*, 74a. In 1985, the Office of the Comptroller of the Currency (OCC)—the primary regulator of national banks—closed the Bank upon a finding of insolvency. *Ibid.* Two different courts of appeals subsequently held that petitioner could not challenge the OCC's insolvency determination under the Federal Tort Claims Act, *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988), or the Takings

Clause, *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066 (Fed. Cir.), *cert. denied*, 513 U.S. 961 (1994).

After the Bank was closed by the OCC, it was placed into a receivership administered by the Federal Deposit Insurance Corporation (FDIC), a federally chartered corporation and independent agency of the federal government. App., *infra*, 74a-75a. One of the FDIC's functions was to liquidate banks closed for insolvency by the OCC. *See* 12 U.S.C. §§ 191, 1821(c) (1982). The receivership commenced shortly after the Bank was closed on June 21, 1985, and was terminated on November 1, 1995. *Id.* at 88a, 100a n.6. By January of 1990, however, the FDIC had paid off *all* of the Bank's depositors and other creditors *in full*, in addition to charging the estate for millions of dollars in alleged liquidation expenses. *See id.* at 4a-5a; C.A. App. A-3018; note 1, *infra*.

Before it began liquidating the Bank's assets, the FDIC obtained information indicating that the Bank had in fact been solvent when it was deemed insolvent and closed by the OCC. *See* App., *infra*, 9a, 39a. Moreover, the estate of the Bank remained solvent after all of its debts had been paid: By November of 1989, with few if any unpaid debts remaining, the estate had "assets of $23,618,669, liabilities of $8,758,150, and equity" of $16,860,520. *Id.* at 29a n.11.

Federal law requires the receiver of a closed bank to distribute the remainder of the receivership estate to the equity owners of the bank. 12 U.S.C. § 194 ("the remainder of the proceeds, if any, *shall* be paid over to the shareholders of such association") (emphasis added). In this case, however, the FDIC failed to adhere to this statutory mandate. Even though the Bank was solvent when it was closed, and the estate had substantial net assets remaining after all depositors and creditors were paid, the owners of the Bank—principally petitioner—received not a penny.

The FDIC avoided its statutory obligation to distribute the receivership estate to the shareholders by engaging in a series of sham transactions designed to deplete the receiver-

ship estate of all surplus assets. Principal among these was the FDIC's decision to pay *itself* "interest" on the sums used (from the Bank's estate) to satisfy the claims of depositors and other creditors—and to do so at a rate of nine percent per annum. The undisputed evidence, however, showed that at the time it was *not* the FDIC's practice to charge so-called "post-insolvency interest." Indeed, one witness testified that "[i]t was the FDIC policy *not* to pay interest after the date of closing. . . . I don't think the FDIC took it upon itself to pay interest after closing unless so ordered by a court." App., *infra*, 16a (quoting Hovan Dep. 192-95) (emphasis added). But the FDIC "took it upon itself" to do so in this case because otherwise "there would be excess funds to pay the stockholders" (*id.* at 17a (quoting Herbert Decl.))—in other words, the government receiver decided to keep the money for itself, in contravention of its established policy, to avoid returning it to petitioner as required by statute. The FDIC ultimately "paid" itself $11,204,166 (of a total claimed of $23,020,785) in post-insolvency "interest" (*id.* at 39a-40a), thus depleting all remaining assets of the estate and leaving nothing for the shareholders.[1]

---

[1] The FDIC also reimbursed itself for highly unusual expenses, purportedly incurred in connection with the operation of the receivership. These expenses included at least $4.2 million for salaries, $4.2 million for "overhead," $625,000 for travel expenses, and $2.8 million for other "professional fees." *See* C.A. App. A-100. In all, the FDIC charged the estate approximately $11 million in alleged liquidation expenses before all creditors were paid in 1990, and the FDIC's own documents reveal it paid itself another $3 million (including $1.94 million in salaries for 1994 alone) before the receivership was terminated in 1995—five years during which the receivership was essentially inactive. *See* C.A. App. A-123. And those assets that it could not reallocate to itself, the FDIC simply frittered away. Although an examination of the Bank a few months before its closure revealed no risk of significant loan losses, by the time the FDIC terminated the receivership it had lost over $15 million on loans and other assets—approximately 15 percent of the original estate. *See* C.A. App. A-109. Moreover, the FDIC's approach to liquidation minimized the value of the surviving estate. The government receiver stripped out and sold the high-yielding assets that were at the core of the

Meanwhile, the Internal Revenue Service purported to assert income tax deficiencies against the Bank for the years 1980-1988. *See* App., *infra*, 23a, 115a-118a. The Internal Revenue Code, however, provides that all "tax shall be abated from such national banks as are found by the [OCC] to be insolvent." 26 U.S.C. § 7507(a). Notwithstanding this mandatory and automatic statutory abatement, the FDIC purported to enter into an agreement with the IRS in which it agreed to "settle" the tax "dispute" for approximately $11.7 million (apparently the full amount of the deficiencies asserted by the IRS). App., *infra*, 115a.[2]

2. Petitioner sued the FDIC, alleging that the FDIC had horrendously mismanaged the receivership of the Bank, having taken possession of a sound and solvent national bank (with more than $16 million of assets in excess of liabilities) and returned to the shareholders a busted-out shell with no assets and, supposedly, more than $20 million in unpaid interest and tax liability claims (held by the same government agencies that had destroyed the institution). Petitioner's amended complaint alleged New York state law claims of unjust enrichment, breach of fiduciary duty, and corporate waste. C.A. App. A-94-A-101. Although petitioner ad-

---

[Footnote continued from previous page]

Bank's pre-closure operations. This not only reduced the income available to the estate, but (ironically) generated the gains on which the IRS purported to assess tax, as described below.

[2] Approximately $10.8 million of the tax "deficiency" arose *after* the Bank was declared insolvent, during the time the estate was being managed by the FDIC. *See* App., *infra*, 116a. Simply put, the IRS refused to accept the FDIC's efforts to manipulate the estate's financial records, and thus the tax "liability" was directly chargeable to the FDIC's mismanagement, not petitioner's pre-closure operation of the Bank. The other $900,000 related to a tax credit taken by the Bank before closure; the IRS revoked the credit based on the FDIC's recharacterization of the underlying asset (the Bank's headquarters building). Thus, this tax "liability" was also directly chargeable to the FDIC's management of the receivership estate. Indeed, the existence of the tax "claim" provided a further incentive for FDIC self-dealing.

vanced a number of theories in the courts below, we focus on two here: The FDIC's unprecedented decision to pay itself "interest" in the amount of approximately $11 million, and the FDIC's waste of approximately $8 million of the Bank's assets. *See* App., *infra*, 51a n.12 (interest paid), 57a-65a (assets wasted).

a. From the outset, the FDIC claimed that it was legally entitled, in its capacity as a subrogee of the insured depositors, to collect interest on sums used (from the Bank's estate) to pay those depositors' claims. In its first decision, the district court correctly recognized that this argument missed the point of petitioner's equitable claims. "Even if the FDIC is correct," the court explained, "[i]f we accept [petitioner's] allegations as true, . . . then [petitioner] has certainly stated a claim for unjust enrichment." App., *infra*, 111a. Similarly, with regard to petitioner's allegations of mismanagement of the estate, the district court noted that, if true, the allegations described a course of conduct "amount[ing] to wrongful appropriation." *Id.* After the case was transferred to a new district judge, however, the court subsequently held that all of petitioner's claims were barred by a release or the statute of limitations. *Id.* at 91a-103a.

In an initial appeal, the Second Circuit held that "it is undisputed that [petitioner] and the FDIC had a fiduciary relationship." App., *infra*, 88a. The court also recognized that "[t]he wrongful act giving rise to restitution here was the FDIC's *payment of interest* to itself." *Id.* at 89a. The court of appeals held that this claim was timely and not barred by the previous release, and remanded the case for further proceedings. *Id.* at 89a-90a.

b. On remand, the district court "h[e]ld that the FDIC is entitled to the payment of interest on the funds that it extends when it is subrogated to the rights of depositors." App., *infra*, 48a-49a. Because the FDIC had a *legal* right to charge interest, the court reasoned, it "did not enrich itself unjustly when it paid itself some portion of the interest for the funds it had extended." *Id.* at 50a. The court recognized that this

conclusion was in conflict with the initial decision in this case, but said that "the law of the case doctrine does not bind us at this juncture." *Id.* at 50a n.11. Moreover, the court made no finding that the FDIC had in fact "extended" any funds on which it could rightfully claim interest, which is unsurprising since the Bank's own assets were sufficient to satisfy depositor and creditor claims and the FDIC simply claimed post-insolvency "interest" from the day the Bank was closed in order to avoid returning any money to the Bank's shareholders.

The district court also held that although petitioner had adduced sufficient evidence to advance to trial on its claim of unlawful dissipation of corporate assets, *see* App., *infra*, 65a, petitioner now lacked standing to raise that claim, *see id.* at 24a-25a. The court reasoned that the elements of this claim amounted to approximately $8 million; "[h]owever, before [petitioner] as a shareholder would be entitled to collect this money, some amount of it would be owed to the FDIC in the form of additional post-insolvency interest that was owed but never paid, and $11,730,753, plus interest, would still be owed to the IRS for the deficiencies it assessed against the receivership estate." *Ibid.* (footnote omitted). "Because these outstanding debts exceed the $7.9 million in possible damages for [petitioner]," the court concluded, "any recovery by [petitioner] is precluded." *Id.* at 25a.

The Second Circuit affirmed on both grounds. The court first held that "the FDIC, as the depositors' subrogee, is entitled to post-insolvency interest." App., *infra*, 14a. To hold otherwise, the court said, would "leave the FDIC with no compensation for the loss of the use of the funds it advanced" (*ibid.*)—simply overlooking the fact that since the depositors were paid in full from the Bank's own assets, the FDIC was not required to advance any funds. Moreover, the court acknowledged that it was not the FDIC's *practice* to charge such interest, but dismissed this undisputed evidence with the *non sequitur* that "internal agency practices do not create legal rights in third parties." *Id.* at 16a. The court also held that petitioner lacked standing to pursue its $8 million waste

claim because "the receivership estate has senior outstanding credit obligations, including a tax liability of approximately $11.7 million." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This is a case in which a government receiver engaged in patently bogus transactions for the sole purpose of avoiding a multi-million dollar payment to which petitioner is statutorily entitled. Even accepting, *arguendo*, the government's authority to seize the Bank some twenty years ago, the Bank's depositors and other non-governmental creditors have all been paid in full. The only injured party remaining is petitioner, which is the rightful owner of the assets remaining in the receivership estate after the Bank was liquidated. The undisputed evidence shows that those assets are substantial (in excess of $16 million), yet the government has refused to comply with its statutory obligation to return those assets to petitioner. 12 U.S.C. § 194. This refusal presents two issues of overriding national importance that warrant this Court's review.

First, the courts below contravened this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), by refusing to hold the FDIC, in its receivership capacity, accountable for a remedy that is available under state law against a private receiver that breached its fiduciary duties in this fashion. Petitioner challenged on *equitable* grounds the receiver's unilateral decision to charge post-insolvency "interest" as a means of avoiding its obligation to distribute the remainder of the receivership estate to petitioner. Contrary to the decisions below, it is of no moment whether the receiver is *legally entitled* to assert a claim for such interest, as the courts below held. Rather, the whole point of an unjust enrichment claim is to force a party to surrender money to which it may hold *legal* title because *equity* compels its disgorgement. *See, e.g.*, I Palmer, *Law of Restitution* § 2.11 (1978) (explaining that disgorgement of recompense or other profit is the appropriate equitable remedy for breach of a fiduciary duty). By refusing to apply this longstanding princi-

ple to the FDIC, the court of appeals created a special rule for government receivers, in plain contravention of *O'Melveny & Myers* and numerous decisions of other courts of appeals.

Second, in finding that petitioner lacked standing to pursue against the FDIC the equitable remedies afforded under state law, the courts below twisted the law of justiciability beyond recognition and, in so doing, abrogated the "virtually unflagging" obligation of all federal courts to adjudicate claims within their jurisdiction. *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*). The $11 million in post-insolvency "interest" constitutes a significant element of petitioner's unjust enrichment claim; to suggest, as the courts below did, that this amount could not be recovered because the FDIC also claims another $12 million in "interest"—from the identical self-dealing that forms the basis of petitioner's challenge—is mere circularity. If petitioner is entitled to recover the "interest" actually paid as restitution, the unpaid "interest" can be no barrier to such a recovery. Nor does the tax "claim" stand as a barrier to recovery, because the Internal Revenue Code automatically abates all taxes against insolvent national banks. Because the IRS had no viable tax claim against the receivership estate, there was nothing for the receiver to "settle"; on the contrary, this was just another self-dealing transaction designed to deprive petitioner of the balance remaining in the estate. While the IRS might assert a tax claim against the Bank (or petitioner) in the event of an eventual recovery, that is a dispute for another day and has nothing to do with petitioner's *standing* to pursue the present case

I. The Court Of Appeals Erroneously Exempted A Government Receiver From Equitable Remedies Available Against Private Receivers

In *O'Melveny & Myers*, the FDIC, acting as receiver of a failed savings and loan institution, sued the S&L's law firm for professional negligence and breach of fiduciary duty under California state law, alleging that the law firm had assisted officers of the S&L in committing fraud upon inves-

tors. *See* 512 U.S. at 82. The law firm defended on the ground that, under California law, knowledge of the corporate officers must be imputed to the corporation, and in turn, to the FDIC as receiver. If the officers' knowledge of the fraud were imputed to the FDIC, the law firm asserted, that estopped FDIC from seeking relief in tort. *Ibid.* The FDIC contended that a federal common-law rule of decision (of its own invention)—not California law—governed the question of whether the knowledge of corporate officers could be imputed to the FDIC as receiver. *See id.* at 83.

Finding no adequate justification for the "displacement of California law," this Court forcefully rejected the FDIC's argument that federal common law should be applied to its receivership operations. 512 U.S. at 85. This Court found such federal pre-emption especially unjustified in view of the "comprehensive and detailed" federal statutory scheme delineating the powers and duties of the FDIC, and the particular "provisions of [federal law] which specifically create special federal rules of decision regarding claims by, and defenses against the FDIC as receiver." *Id.* at 85-86 (citing statutory provisions). The Court concluded that the Ninth Circuit had erred badly in holding that the FDIC had presented "one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *Id.* at 89; *see also id.* at 90 (Stevens, J., concurring) ("Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply relevant rules of state law.").

The court of appeals in this case failed to adhere to the mandate of *O'Melveny & Myers*, choosing instead to create a federal law of unjust enrichment that departs radically from applicable New York state law (and, for that matter, from general federal common law as announced by this Court). According to the court of appeals, a finding that a payment or transfer of property is authorized by statute pretermits any further inquiry as to whether principles of equity might dic-

tate restitution. This newly announced rule cannot be reconciled with the general principle that "[e]quity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting." *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951). Nor is it consistent with the particular state law that, under *O'Melveny & Myers*, ought to have governed the decisions below.

As the courts below acknowledged, petitioner's amended complaint states claims under state law for *equitable* relief. *See* App., *infra*, 13a n.8, 106a-107a. This was a hotly contested point: The FDIC originally sought dismissal of petitioner's complaint on the ground that it sounded in tort and sought money damages and that, therefore, the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, provided the exclusive remedy for petitioner, and that petitioner had failed to exhaust its administrative remedies as required by that Act. The district court denied the FDIC's motion, holding that "[petitioner] is seeking not money damages, but rather an equitable remedy. A right of recovery for unjust enrichment is essentially equitable." App., *infra*, 107a (internal quotation marks omitted).[3]

Having acknowledged that petitioner's claims were equitable in nature, the court of appeals proceeded to strip any equitable component from the analysis, deciding that the FDIC's *legal* entitlement to certain payments operated to bar any *equitable* recovery by petitioner. This ruling thus supplanted New York's state law of unjust enrichment and replaced it with a federal rule of decision, applicable only to government defendants, in plain violation of this Court's decision in *O'Melveny & Myers*.

Under New York State law, the basic elements of an unjust enrichment claim require proof that (1) defendant was

[3] Any doubt about the equitable nature of petitioner's claims was put to rest when the district court held that because petitioner sought only equitable relief, petitioner was not entitled to a jury trial. *See* App., *infra*, 68a-71a.

enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover. *See, e.g., Clark* v. *Daby*, 751 N.Y.S.2d 622, 623 (App. Div. 3d Dep't 2002); *see also* App., *infra*, 13a n.8 (citing *Lake Minnewaska Mountain Houses, Inc.* v. *Rekis*, 686 N.Y.S.2d 186, 188 (App. Div. 3d Dep't 1999)); *id.* at 43a (citing *Dolmetta* v. *Unitah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983)). Since the first two elements were not contested in this case, petitioner's unjust enrichment claim boiled down to whether, under New York State law, "equity and good conscience" dictated that the FDIC return to the receivership estate the "interest" (and other expenses) it had paid to itself.

But neither "equity" nor "good conscience" figured anywhere in the court of appeals' analysis. The Second Circuit resolved petitioner's unjust enrichment claim solely by reference to the facts that, under New York law, "a depositor who prevails on a claim against a failed back is entitled to collect the ordinary and inherent interest on his judgment" and that, by federal statute, the FDIC is subrogated to those rights. App., *infra*, 13a (citing *People* v. *Am. Loan & Trust Co.*, 65 N.E. 200, 201 (N.Y. 1902), and 12 U.S.C. § 1821(g) (1982)). Similarly, the court of appeals approved the FDIC's assessment of interest at an unheard-of rate of nine percent per annum, noting that "an ordinary judgment in New York state court would earn as much." App., *infra*, 15a (citing N.Y. C.P.L.R § 5004 (McKinney 1963)). As far as the courts below were concerned, that the FDIC was *empowered* by statute to "award[] itself nine percent post-insolvency interest" was sufficient to dispose of petitioner's claim that it was *inequitable* for the FDIC to do so. App., *infra*, 13a. [4]

---

[4] To the extent the FDIC attempts to defend the decision below on the ground that its decision to pay itself interest comported with principles of equity, such an attempt would fail on two grounds: First, the courts below made no such finding; and second, they could not have done so at the summary judgment stage because the equities of the FDIC's administration of the estate are the central disputed issue in the case.

The mere fact, however, that the FDIC's payments of interest to itself might not have been plainly unlawful cannot itself demonstrate that "equity and good conscience" militates in favor of permitting the FDIC to retain those funds at the expense of the Bank's shareholders. Indeed, the animating rationale of an unjust enrichment claim under New York law is to compel a person, when equity and justice require, to disgorge property that he has otherwise acquired by legal means. Under New York's doctrine of the "faithless trustee," if petitioner establishes that the FDIC breached the fiduciary duties it owed as a receiver by dissipating the Bank's corporate assets, the Bank and its shareholders would be entitled to recover *all* compensation paid to the FDIC for its receivership services—*even if* the receipt of that compensation was not "illegal." *See Vinlis Constr. Co.* v. *Roreck*, 314 N.Y.S.2d 8, 8 (N.Y. 1970); *Soam Corp.* v. *Trane Co.*, 608 N.Y.S.2d 177 (App. Div. 1st Dep't 1994); *see also In re Ivan F. Boesky Sec. Litig.*, 36 F.3d 255, 264-65 (2d Cir. 1994) ("A principal is entitled to restitution of compensation paid if an agent breaches it duties of loyalty or obedience. *Restatement (Second) of Agency* § 469 cmt. a (1958).").

As a leading commentator has explained, "[t]he duties of a fiduciary are among the most important known to the law, it is indispensable that there be some sanction for their breach, and often the only effective sanction is restitution in favor of the principal of gains realized by the fiduciary." Palmer, *supra*, at 141. A receiver that loots an estate, as petitioner alleges the FDIC has done, can hardly be heard to defend on the ground that it was given statutory license to loot; rather, equity will require the receiver to account to the stockholders for its actions—or, at least, it did until the aberrational decision below was announced. In this regard, the FDIC's undisputed policy of *not* paying itself post-insolvency interest is relevant. The point is not, as the court of appeals thought, that this policy creates "rights" that can be enforced by petitioner (App., *infra*, 16a); rather, the FDIC's *departure* from this policy—for the avowed purpose of depriving petitioner of any recovery—is clear and con-

vincing *evidence* of the receiver's abandonment of its fiduciary responsibilities and its decision to choose a course of self-dealing rather than faithful stewardship of the receivership estate. Indeed, the FDIC did not actually pay itself "interest" until long after all other creditors were paid in full (App., *infra*, 103a n.9), at a time when the sole purpose of the payment was to avoid returning any funds to petitioner.

The court of appeals' adoption of a special federal rule of decision applicable to unjust enrichment claims against the FDIC intractably conflicts with this Court's admonition, in *O'Melveny & Myers*, that a court may adopt a federal rule of decision only "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" 512 U.S. at 87 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *accord Atherton* v. *FDIC*, 519 U.S. 213, 218-19 (1997). The FDIC has never attempted in this case to articulate a federal policy that could override state law, and the courts below made no findings in this regard. Accordingly, the Second Circuit's frolic and detour into federal common-law-making is wholly unjustified and warrants this Court's review.[5]

---

[5] The Second Circuit's decision to create a federal rule of decision to resolve petitioner's unjust enrichment claim also conflicts with the decisions of several courts of appeals holding, in accordance with *O'Melveny & Myers*, that state law claims—even those brought against federal defendants—must be decided entirely according to state law. *See FDIC* v. *Houde*, 90 F.3d 600, 604 (1st Cir. 1996) (looking to Maine law to determine whether FDIC could enforce note); *FDIC* v. *Delgau*, 207 F.3d 153, 166-67 (3d Cir. 2000) (Pennsylvania law must govern Rule 60(b) motions to strike or open a confessed judgment); *Federal Fin. Co.* v. *Hall*, 108 F.3d 46, 50 (4th Cir. 1997); *FDIC* v. *McFarland*, 243 F.3d 876, 888 (5th Cir. 2001) (Louisiana reinscription law governs the status of FDIC liens). This conflict among the circuits independently warrants this Court's review.

II. The Court Of Appeals Erroneously Concluded That Petitioner Lacks Standing To Pursue Equitable Remedies Against The Government Receiver

The court of appeals compounded its error when it affirmed the district court's ruling that petitioner lacked standing to seek relief from the FDIC's dissipation of the Bank's corporate assets. The court of appeals held that "senior outstanding credit obligations, including a tax liability of approximately $11.7 million," meant that "even if [petitioner's] waste claims were meritorious, it would recover nothing." App., *infra*, 17a. "These facts," the Second Circuit held, "deprive [petitioner] of standing." *Ibid.* But these predicate "facts" are demonstrably false.

The FDIC assessed a total of $23 million in post-insolvency "interest," and paid itself $11 million of this amount (which was sufficient to wipe out the remaining assets and deprive petitioner of any recovery). The district court held explicitly (App., *infra*, 25a & n.7), and the court of appeals suggested implicitly (*id.* at 17a), that petitioner could not recover this $11 million (or, alternatively, the $8 million or more in other corporate waste claims) because it did not exceed the FDIC's unpaid claim for $12 million more in "interest." This is obviously wrong. If, as petitioner contends, it was a breach of fiduciary duty for the FDIC to assess post-insolvency "interest" against the estate, then *all* of the "interest"—paid and unpaid—must be disgorged. The violation can hardly be set up as a defense.

The courts below were also wrong in concluding that the estate's supposed "liability" for $11.7 million in taxes deprived petitioner of standing. This "liability" arose only because the FDIC decided to "settle" a "claim" asserted by the IRS in this amount. But the "claim" was in fact worth zero as a matter of federal law, so the FDIC's accession to it was yet another bogus transaction (and further evidence of the receiver's total failure to live up to its fiduciary responsibilities).

Section 7507 of the Internal Revenue Code is entitled: "Exemption of insolvent banks from tax." In the case of national banks deemed insolvent by the OCC—like the Bank at issue here—"such tax *shall be abated*." 26 U.S.C. § 7507(a) (emphasis added). Since the OCC had declared the Bank insolvent, it had no tax liability as a matter of law.[6]

Notwithstanding the automatic and mandatory abatement of tax effected by Section 7507, in September 1993—eight years after the OCC deemed the Bank insolvent and closed it on that basis—the IRS presented to the FDIC a bill totaling $11.7 million for the Bank's alleged tax deficiencies for years 1980-1988. The FDIC, acting "on behalf of the taxpayer," purported to "settle" this "tax dispute." App., *infra*, 115a-116a. The courts below viewed this "settlement" as creating a tax liability senior to the claim of any of the Bank's equity holders, including petitioner. But as the Closing Agreement itself recognized, the IRS's claimed $11.7 million tax deficiency had been "abated pursuant to §7507(a)," providing the Bank with conditional "immunity" from taxation. App., *infra*, 116a.[7]

Far from creating a tax liability, the Closing Agreement only established the amount of tax that could be "assessed or reassessed," pursuant to 26 U.S.C. § 7507(c)(2), once "it appear[ed] that payment of the tax w[ould] not diminish the as-

---

[6] The court of appeals acknowledged "the irony that the IRS's tax deficiency is allegedly premised on the Bank's solvency in 1985," but said it could not "discern any legal argument from that observation." App., *infra*, 18a. The "legal argument" is that the IRS had no statutory warrant to revisit the OCC's insolvency determination, with the result that all tax against the Bank was automatically abated by statute, with the further result that the tax "liability" is no barrier to petitioner's equitable claims.

[7] An "abatement" is defined as "the act of eliminating or nullifying," Black's Law Dictionary 3 (8th ed. 2004), and the effect of a tax abatement is to release the taxpayer from the obligation to account for the tax liability assessed against the taxpayer. *See* 26 U.S.C. § 6404 (describing forms of abatement); *Crompton-Richmond Co.* v. *United States*, 311 F. Supp. 1184, 1186 (S.D.N.Y. 1970).

sets which are necessary for the full payment of the taxpayer's depositors' outstanding claims." *Ibid.* It is this act of *assessment* that creates the liability in the taxpayer to pay the assessed amount. *See Rambo* v. *United States*, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974); *Cohen* v. *Gross*, 316 F.2d 521, 522-23 (3d Cir. 1963) (assessment "officially record[s] the fact and the amount of a taxpayer's administratively determined tax liability, with consequences somewhat similar to a reduction of a claim to judgment"); *In re Western Trading Co.*, 340 F. Supp. 1130, 1133 (D. Nev. 1972) (assessment is "administrative determination of tax liability . . . [a]nd until assessment has been made, the tax has not been found to be owing") (citations omitted); *see also* 26 U.S.C. § 6203 ("The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary . . . ."). Until the IRS assesses the Bank (or petitioner) for its alleged tax deficiencies, those alleged deficiencies remain abated, and as such can create no liability in the Bank.[8]

The incontrovertible fact that there is no tax liability against the Bank at present demolishes the essential predicate for the court of appeals' conclusion that petitioner lacked standing to sue on its claim of dissipation of corporate assets. It also renders irrelevant the sole authority on which the courts below relied in holding that the supposed tax liability could deprive petitioner of standing. *See* App., *infra*, 17a & 25a-26a (discussing *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995), *cert. denied*, 515 U.S. 1027 (1996)). In *Herring*, the claim of the senior creditor was not disputed, and there was

---

[8] The total failure of the courts below to come to grips with petitioner's equitable claims is captured in the district court's statement that "the unpaid post-insolvency interest and the IRS deficiencies stand in the way of any recovery by Bancorp." App., *infra*, 27a n.9. The whole point of petitioner's lawsuit is that neither of those claims would have existed had the FDIC faithfully managed the estate. *See id.* at 111a. To hold that the clearest evidence of the FDIC's abandonment of its fiduciary responsibilities itself gives rise to a "impossibility of recovery" (*id.* at 27a n.9) is legal "reasoning" that only the Red Queen could endorse. *See* L. Carroll, *Through the Looking Glass* (1871).

no suggestion that the claim had been manufactured solely to thwart the standing of the stockholders.[9]

Here, in sharp contrast to *Herring*, the FDIC's willingness to "settle" the tax "claim" for $11.7 million—100% of the amount sought by the IRS—is further evidence of its faithlessness. Rather than seeking to marshal and preserve the assets of the receivership estate, as it had a fiduciary obligation to do, the FDIC gave all the money away, both to itself and to a sister agency, for the avowed purpose of avoiding paying it to petitioner as it was required by statute to do. Petitioner claims that this was a fiduciary breach; the court of appeals erred in concluding that the complained-of conduct serves to deprive petitioner of standing. By so doing, the court essentially granted a default judgment to the FDIC on the principal point of contention. Other courts, by contrast, recognize that "[d]ue process requires" that a bank holding company be provided "a meaningful opportunity to challenge the Government's actions." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1101 (D.C. Cir. 1996).

The court of appeals' conclusion that petitioner lacks standing to pursue its equitable claims against the FDIC was based on a clear misreading of federal law. The tax issue cannot be used to preclude the very lawsuit that challenges the validity (and value) of the IRS tax "claim" and the FDIC's "settlement" of it. If petitioner proves that the tax

---

[9] Moreover, even if there were a "senior outstanding credit obligation[]" in the form of "a tax liability of approximately $11.7 million"—and, as demonstrated above, this is emphatically not the case—the existence of such a liability still could not deprive petitioner of standing. Here, petitioner most certainly would not—as the Second Circuit would have it—"recover nothing." App., *infra*, 17a. Petitioner's potential recovery for its corporate waste claim includes not only at least $8 million to compensate the Bank for assets wrongfully dissipated, but also the $11.2 million in post-insolvency interest that the FDIC elected to pay itself as compensation for undertaking the role as receiver. The aggregate of those sums far outstrips the purported $11.7 million tax liability. Thus the tax liability upon which the dismissal of petitioner's equitable claims was predicated is not only false, but irrelevant, as well.

"claim" is worth zero (or any other amount less than it is entitled to receive in restitution), petitioner has standing to bring this suit both directly, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and derivatively, *Gollust* v. *Mendell*, 501 U.S. 115, 127 (1991). The court of appeals' contrary conclusion cannot be reconciled with decisions such as these, or with the federal courts' "virtually unflagging" obligation to adjudicate cases on their merits (*see NOPSI*, 491 U.S. at 359) this conflict warrants review and correction.

* * *

As explained above, the court of appeals' decision cannot be reconciled with several strains of this Court's precedent, particularly the refusal to exempt the FDIC from state law (*see O'Melveny & Myers*, 512 U.S. at 85-86) as well as fundamental principles of standing and redressability. The FDIC's egregious abandonment of its fiduciary duties in this case is, one would hope, unprecedented. The derelictions alleged by petitioner so far transcend the normal operation of a receivership estate, and the Second Circuit's refusal to hold the FDIC accountable for its gross misconduct so far departs from the ordinary course of federal adjudication and this Court's precedents, that this Court's supervision is warranted. S. Ct. R. 10(a); *see, e.g.*, *Nguyen* v. *United States*, 539 U.S. 69, 73-74 (2003); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 470 (1982). Review is warranted to ensure that abuses such as these are not condoned, and to prevent what otherwise would be a shocking miscarriage of the public trust. Petitioner seeks only a trial on the FDIC's mismanagement of the receivership; justice and equity demand nothing less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK A. PERRY
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioners

July 5, 2005

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

Argued June 7, 2004 Decided July 14, 2004

No. 03-6194

GOLDEN PACIFIC BANCORP, for its own account and derivatively on behalf of and in the name of Golden Pacific National Bank,

Plaintiff-Appellant,

GOLDEN PACIFIC BANCORP,

Counter-Defendant-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity and in its capacity as receiver for Golden Pacific National Bank,

Defendant-Appellee,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Counter-Claimant.

Elliot H. Scherker, Greenberg Traurig, P.A., (Julissa Rodriguez, Greenberg Traurig, P.A., Miami, FL, Tucker Byrd, Greenberg Traurig, P.A., Orlando, FL, Simon Miller,

Greenberg Traurig, LLP, New York, NY, and Paul A. Batista, New York, NY, on the brief), Miami, FL for Appellant.

Lawrence S. Hirsch, Thelen, Reid & Priest (Ann S. DuRoss, Colleen J. Boles, J. Scott Watson, and Alan L. Spear, Washington, D.C., on the brief), New York, New York, for Appellee.

Before: MINER and RAGGI, *Circuit Judges*, and MARRERO, *District Judge*.*

MARRERO, *District Judge*:

This lawsuit arises from the Federal Deposit Insurance Corporation's ("FDIC") June 1985 liquidation of the Golden Pacific National Bank (the "Bank"), which was based in Manhattan's Chinatown neighborhood. The Bank's holding company, plaintiff Golden Pacific Bancorp ("Bancorp"), alleges that the FDIC should never have liquidated the Bank in the first place, and, to make matters worse, that the FDIC chose the most expensive liquidation method possible. Bancorp further alleges that the FDIC wastefully charged certain expenses to the receivership estate, and that, when the Bank's creditors were finally paid, the FDIC depleted the remaining estate by improperly paying itself interest on the insurance funds it had disbursed to depositors on the Bank's behalf. Bancorp seeks to recover against the FDIC under theories of unjust enrichment, breach of fiduciary duty, and corporate waste. The District Court granted the FDIC summary judgment on all claims.

The primary issue on appeal is whether the FDIC, as subrogee to the claims of a failed bank's FDIC-insured de-

---

* The Honorable Victor Marrero, United States District Judge for the Southern District of New York, sitting by designation.

positors, may collect post-insolvency interest on those claims from the failed bank's estate. We hold that such interest payments are not improper. We also hold that Bancorp's evidence suggesting that the FDIC breached its fiduciary duties by choosing an expensive wind-up method is too speculative to defeat summary judgment. Finally, we hold that Bancorp lacks standing to pursue certain waste claims because the Bank's outstanding obligations to a senior creditor, the Internal Revenue Service ("IRS"), would preclude any potential recovery for Bancorp. Accordingly, the judgment of the District Court is affirmed.

I. BACKGROUND

On June 17, 1985, officials from the Office of the Comptroller of the Currency ("OCC") and the FDIC, acting upon an informant's tip, conducted a surprise examination of the Bank for the purpose of scrutinizing certain custodial certificates — known for their color as "yellow CDs" — which the Bank had been issuing to its customers. The Bank maintained that the yellow CDs were actually investments placed with the Bank as agent, as opposed to deposits (*i.e.*, liabilities) of the Bank. The Bank also told OCC officials that, even if the yellow CDs were considered liabilities, they were backed by sufficient assets to maintain the Bank's solvency. The OCC disagreed on both points, and, by the end of the week, closed the Bank and declared it insolvent.

The FDIC insured the Bank's depositors, and the OCC appointed the FDIC also to serve as the Bank's receiver. The FDIC's dual roles as insurer and receiver arise by statutory design, and it is not uncommon for the FDIC to serve in both capacities with respect to a single bank liquidation. *See FDIC v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991); *see also Tex. Am. Bancshares, Inc. v. Clarke*, 954 F.2d 329, 335 (5th Cir. 1992) ("The separateness of these dual identities of the FDIC has been well respected by federal courts.").

As insurer, the FDIC was statutorily required to either pay depositors the insured amounts in cash, or to make the depositors' accounts available up to the insured amounts through another FDIC-insured bank. *See* 12 U.S.C. § 1821(f)(1) (1982). In this case, the FDIC chose to address virtually all of its insurance obligations by soliciting bids from financially healthy banks to enter into a so-called Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA"). Under a DITAPA, the healthy bank agrees to purchase certain of the failed bank's assets at a premium in exchange for the FDIC making the insured deposits of the failed bank available through the healthy bank (which presumably is interested in the depositors' business).

The FDIC ultimately entered into a DITAPA with the only bidder, Hong Kong and Shanghai Banking Corporation ("HKSB"), which paid a premium of over $6 million and agreed to purchase approximately $61 million of the Bank's assets. The FDIC covered its remaining insurance obligations (pertaining to the Bank's various loan production offices outside New York) either through a similar arrangement or by direct payment. By the end of 1986, the FDIC had paid over $140 million in insurance claims, virtually all of which went to HKSB as the Bank's paying agent under the DITAPA.

By statute, the FDIC was subrogated to the claims of insured depositors to the extent of the FDIC's insurance payments. *See* 12 U.S.C. § 1821(g) (1982). Beginning in July 1986, the FDIC, as receiver, began repaying its creditors, the largest of which was itself, as insurer, for having covered the insured deposits. By early 1990, the FDIC had repaid the amount of all principal owed to all the Bank's creditors.

The FDIC then began to make interest payments to creditors. Based upon New York's nine-percent statutory judgment rate, the FDIC determined that it owed itself approximately $23 million and that it owed non-FDIC creditors

approximately $2.8 million.[1] By mid-1994, those creditors had received just under half of the interest payments owed. The FDIC inactivated the receivership in 1995.

Bancorp initiated this lawsuit in 1995, seeking to recover against the FDIC, in both its corporate capacity as insurer and in its capacity as the Bank's receiver, under theories of unjust enrichment, breach of fiduciary duty, and corporate waste. Bancorp contends that the June 1985 "regulatory ambush" rashly dubbed the Bank insolvent in the face of clear evidence to the contrary. *See* Am. Compl. ¶ 35.[2] Bancorp alleges that the FDIC breached its fiduciary duty to the Bank by continuing with the liquidation in light of that evidence and by choosing, before performing the customary cost

---

[1] The record indicates that there are hundreds of non-FDIC creditors, including, for example, a cleaning company, a newspaper service, and an office supply company, all of which presumably had some business relationship with the Bank before it closed. There are also hundreds of individual creditors, some of whom presumably were depositors who had deposits with the Bank exceeding the insured amount.

[2] In 1985, Bancorp unsuccessfully sued the OCC to obtain declaratory relief and damages in connection with the OCC's allegedly erroneous solvency determination. *See Golden Pac. Bancorp v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988). The Court of Appeals held that the OCC's solvency determination involved the type of discretionary judgment for which the government retained sovereign immunity under the Federal Tort Claims Act. *See id.* at 512 ("[T]he decision to close the Bank-made after a week of examination and in the face of a run of withdrawals-could not possibly be thought of as other than a discretionary act that was committed by Congress to the [OCC's] judgment.").

evaluation, to wind up the bank by the very costly DITAPA method.

Bancorp also asserts that the FDIC breached its fiduciary duties and was unjustly enriched by awarding itself interest on its insurance payout. Bancorp contends the interest award was improper altogether and, in any event, excessive. Finally, Bancorp claims that the FDIC was wasteful in charging certain expenses to the receivership, such as professional fees and travel fees, and in paying itself the allegedly excessive interest.

In the two opinions that are the subject of this appeal, the District Court granted the FDIC summary judgment on all claims. *See Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281, 2003 WL 21496842 (S.D.N.Y. June 27, 2003); *Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281, 2002 WL 31875395 (S.D.N.Y. Dec. 26, 2002).[3]

---

[3] At the outset of this lawsuit, the District Court denied the FDIC's motion to dismiss, which contended, among other things, that the Federal Tort Claims Act's exhaustion requirement barred Bancorp's claims and that the Administrative Procedure Act deprived the Court of jurisdiction. *See Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281, 1997 WL 626374, at *1-2 (S.D.N.Y. Oct. 7, 1997). However, the District Court later granted the FDIC summary judgment on the ground that the claims were barred by a 1988 release between the parties, and because the statute of limitations had lapsed. *See Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281, 2000 WL 776928, at *4-5 (S.D.N.Y. June 15, 2000). This Court reversed on both points. *See Golden Pac. Bancorp v. FDIC*, 273 F.3d 509 (2d Cir. 2001). These issues are not relevant to the present appeal.

II. STANDARD OF REVIEW

On appeal, we review the District Court's grant of summary judgment *de novo*. *See Golden Pac.*, 273 F.3d at 514. The Court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

We first look to the substantive law of the action to determine which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Even if the parties dispute material facts, summary judgment will be granted unless the dispute is "genuine," *i.e.*, unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249.

Where, as here, the non-moving party would bear the burden of persuasion at trial, the moving party must first make a *prima facie* case by either identifying the portions of the record "which it believes demonstrate the absence of a genuine issue of material fact" or "pointing out . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). After such a *prima facie* showing, the non-moving party must respond with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To this end, "the non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). In other words, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt

as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted).

Throughout this inquiry, the Court must credit the nonmoving party's evidence and draw all justifiable inferences in favor of that party. *See Anderson*, 477 U.S. at 255.

III. DISCUSSION

A. *THE LIQUIDATION METHOD*

In its capacity as receiver, the FDIC "steps into the shoes of the failed bank" and "has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders." *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994). Generally speaking, a receiver "owes a duty of strict impartiality . . . to all persons interested in the receivership estate," and also must "endeavor to realize the largest possible amount for assets of the estate." *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946) (internal quotation marks omitted).[4] It is undisputed that, as a receiver, the FDIC owes a fiduciary duty to the Bank's creditors and to Bancorp.[5] *See Golden*

---

[4] We assume, as the parties have done, but do not decide, that the scope of the FDIC's fiduciary duties is governed by New York law, and is no different from that of any other trustee or receiver.

[5] We have previously recognized that the FDIC, as receiver, has "broad discretion in the disposition of its assets." *Gosnell v. FDIC*, 938 F.2d 372, 376 (2d Cir. 1991). Because Bancorp presents virtually no evidence that the FDIC acted improperly, we need not address here whether and to what extent the FDIC's fiduciary relationship to Bancorp limits that statutory discretion.

Pac., 273 F.3d at 519. Bancorp argues that the FDIC breached that duty by mismanaging the receivership and leaving Bancorp's shareholders with nothing.

Bancorp contends that the FDIC's first mistake was ignoring the fact that the Bank was actually solvent when the FDIC took over. As evidence of the Bank's solvency, Bancorp points to the FDIC's own balance sheets and an independent auditing firm's report showing that the Bank was solvent before the FDIC entered into the DITAPA. Bancorp also emphasizes that the IRS had determined that the Bank was solvent in 1985 and had attempted, against FDIC resistence, to collect taxes accordingly. The FDIC and IRS ultimately settled the matter, on terms that Bancorp contends are premised on the Bank having actually been solvent in 1985.

Bancorp's complaint faults the FDIC for putting the Bank into receivership in light of the evidence of solvency. This allegation ignores that the FDIC was precluded by statute from refusing to accept the receivership appointment or otherwise attempting to undo the OCC's solvency determination. *See* 12 U.S.C. §§ 191, 1821(c) (1982). At oral argument, Bancorp's counsel conceded this point. Bancorp nevertheless maintains that the FDIC, knowing that the Bank could cover its debts, should have proceeded on a less drastic course, such as simply continuing to operate the Bank, creating a new "bridge bank" to manage the Bank's operations, or entering into a so-called purchase and assumption ("P&A") agreement with a healthy bank. A P&A resembles a merger but is "structured as a purchase of assets (that is, loans) and assumption of liabilities (that is, deposits) of the failing bank by the acquiring bank, with the FDIC making up the shortfall between the value of the liabilities assumed and the assets purchased." III Michael P. Mallow, *Banking Law and Regulation § 11.3.2.*, at 11.24 (2004); *see also Federal Deposit Ins. Corp. v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 637-38 (11th Cir. 1984) (describing a P&A). *See generally* Barry S. Zisman & Marquerite N. Woung, *The Superpowers*

of the FDIC/RTC and Their Availability to Third Parties, 108 Banking L.J. 516, 519-23 (1991) (discussing the various alternatives available to the FDIC in dealing with failed financial institutions).

We agree with the District Court that Bancorp's arguments are unsupported and unavailing. As an initial matter, the statutory scheme at the time of the liquidation evinced a careful division of labor between the OCC and the FDIC: the OCC determined whether a bank was insolvent and, if so, the FDIC was required to wind up the bank and cover its insurance obligations. *See* 12 U.S.C. § 1821(c) (1982) (stating that, after the OCC determined an insured bank was insolvent, the OCC "shall appoint the [FDIC] receiver"); *id.* § 191 (stating that an appointed receiver "shall proceed to close up" an insolvent bank); *id.* § 1821(f) (stating that "payment of the insured deposits . . . shall be made by the [FDIC] as soon as possible").[6] To the extent Bancorp suggests that the FDIC should have done anything short of an immediate wind-up of the Bank, the statutes' mandatory language leads us to conclude otherwise.

Bancorp's evidence that the FDIC breached its fiduciary duties by failing to apply one of the allegedly milder wind-up methods available, instead of the DITAPA, falls far short of

---

[6] The current versions of those statutes contain similarly mandatory language. *See* 12 U.S.C. § 191 (2000) (stating that the OCC's appointed receiver "shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank"); *id.* § 1821(c)(2)(A)(ii) (stating that, when liquidating an insured bank, the FDIC "shall be appointed receiver, and shall accept such appointment"); *id.* § 1821(f) ("payment of the insured deposits . . . shall be made by the [FDIC] as soon as possible").

what is required to defeat summary judgment. Bancorp clings principally to the vague and isolated comment of one FDIC official that small banks typically lose twenty-five percent of the value of their assets when liquidating those assets. Bancorp would have the Court infer from that general statement that one of Bancorp's suggested alternative wind-up methods — which may have kept the Bank's business alive either as *Golden Pacific* or through another bank — would have saved the liquidation costs associated with ending the Bank's business altogether under the DITAPA and would have ultimately preserved more receivership assets for Bancorp's shareholders. Without any additional compelling evidence, that inferential leap is so wide as to amount to sheer speculation.

Bancorp's general observation about liquidations does not even purport to compare the DITAPA method with any other method generally, much less explain how any other method would have been preferential on the facts of this case. For example, Bancorp has not suggested that any other particular bank would have been willing to enter into a P&A and assume the liabilities of the Bank, which at the time was subject to investigation for financial improprieties in connection with the yellow CDs. Bancorp has not offered the comparative costs of either creating a new bank or covering the excess liabilities involved in a P&A, as applied to this case.[7] Moreover, Bancorp does not even allege that the Bank would

---

[7] At the time of the Bank's liquidation, the FDIC was authorized to enter a P&A only if it determined that the "sweetener" it paid to the assuming bank would be less than liquidation costs, or that continuing the Bank's operations would be essential to providing adequate banking services in the Bank's community. *See* 12 U.S.C. § 1823(4)(A) (1982).

have been considered a small bank, or that its liquidation incurred losses typical of a small bank liquidation.

Bancorp also directs the Court's attention to judicial opinions and journal articles for the general proposition that P&A arrangements are the preferred method of winding up a failed bank. Again, however, those general observations have no nexus to the facts of this case. None of the policy arguments presented in the sources cited by Bancorp lends any evidentiary support to its position that the DITAPA method is the most expensive one, or that its use by the FDIC could amount to a breach of its fiduciary duties to a failed bank's shareholders. Along similar lines, Bancorp alleges that the FDIC deviated from its customary policy of performing a cost test before choosing a method of winding up a bank. Such an allegation is immaterial in absence of any evidence that the cost test would have led the FDIC to act differently.

In sum, Bancorp's speculation that the FDIC's chosen wind-up method (which is expressly authorized by statute) might have been more expensive than other options is insufficient to defeat summary judgment, especially absent any meaningful evidence or analysis of the facts of this particular liquidation.

B. *POST-INSOLVENCY INTEREST*

Bancorp suggests there are genuine issues of material fact as to whether the FDIC acted properly in awarding itself nine percent post-insolvency interest on the funds it had previously paid to cover its insurance obligations. In particular, Bancorp alleges that the payments resulted in an unjust en-

richment and constituted a breach of fiduciary duty.[8] We disagree.

The statutory scheme at the relevant time stated that the FDIC, after paying insured depositors, was "subrogated to *all* the rights of the depositor against the closed bank to the extent of such [insurance] payment." 12 U.S.C. § 1821(g) (1982) (emphasis added). Even more specifically, the FDIC was entitled "to receive the same dividends from the proceeds of the assets of such closed bank . . . as would have been payable to the depositor on a claim for the insured deposit." *Id.* Under New York law, a depositor who prevails on a claim against a failed bank is entitled to collect the ordinary and inherent interest on his judgment after all the creditors are paid the principal owed. *See People v. Am. Loan & Trust Co.*, 172 N.Y. 371, 65 N.E. 200, 201 (N.Y. 1902). Moreover, the Supreme Court has long since recognized the general proposition that creditors to a liquidation are entitled to interest, just as any other judgment creditor, even absent specific statutory authorization. *See Nat'l Bank of the Commonwealth v. Mechanics' Nat'l Bank*, 94 U.S. 437, 439 (1878) ("The interest lawfully accruing upon each of the claims was as much a part of it as the original debt."); *see also Stein v. Delano*, 121 F.2d 975, 980-81 (3d Cir. 1941) (holding that creditors of insolvent bank are entitled to inter-

---

[8] Under New York law, a plaintiff asserting a claim of unjust enrichment must show that the defendant was enriched at the plaintiff's expense and that equity and good conscience require the plaintiff to recover the enrichment from the defendant. *See, e.g., Lake Minnewaska Mountain Houses, Inc. v. Rekis*, 686 N.Y.S.2d 186, 188 (App. Div. 3d Dep't 1999).

est, just as any other judgment creditor).[9] It follows that the FDIC, as the depositors' subrogee, is entitled to post-insolvency interest. The only two cases we have found directly addressing the issue agree. *See Federal Deposit Ins. Corp. v. Citizens State Bank*, 130 F.2d 102 (8th Cir. 1942); *FDIC v. Iowa Growthland Financial Corp. (In re Receivership of First Nat'l Bank in Humboldt)*, 523 N.W.2d 591 (Iowa 1994).

Furthermore, we note that to hold otherwise would give Bancorp the windfall of essentially an interest-free loan, and leave the FDIC with no compensation for the loss of the use of the funds it advanced. *See Citizens State Bank*, 130 F.3d at 104 n.6 ("Neither the purpose of the Act nor its legislative history evidences any philanthropic intent, in a situation such as this, to allow the use of the [FDIC's] funds to become a source of profit to stockholders of a defaulting bank, at the expense of the [FDIC]."); *Humboldt*, 523 N.W.2d at 594-95 (stating that the fiscal integrity of the FDIC's insurance should not be compromised for the benefit of a failed bank's investors); *see also Corbin v. Fed. Reserve Bank of New York*, 475 F. Supp. 1060, 1069 (S.D.N.Y. 1979) ("FDIC is

---

[9] We note, however, that interest cannot be paid to any depositor or creditor, including secured creditors, unless the receivership first satisfies its principal obligations to all creditors. *See Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 410-413 (1938); *accord Citizens State Bank v. Federal Deposit Ins. Corp.*, 946 F.2d 408, 416-17 (5th Cir. 1991) ("The courts have consistently denied post-insolvency interest, as such an award would violate the rules of 'ratable' distribution. [An] exception[] to this rule [is] where the assets of the receivership are sufficient to pay all provable claims in full . . . .").

not obligated even if named as Receiver to apply its trust fund for the benefit of the interests of subordinate debenture and stock holders of insolvent banks or to furnish subsidies for them."), *aff'd*, 629 F.2d 233 (2d Cir. 1980).

We also agree with the District Court that the amount of the FDIC's interest payment was proper. The FDIC charged interest at a rate of nine percent, under the theory that an ordinary judgment in New York state court would earn as much. *See* N.Y. C.P.L.R § 5004 (McKinney 1963). We need not decide whether the 9% rate would result in unjust enrichment or amount to a breach of fiduciary duty because, as the District Court correctly noted, the FDIC received only a partial payment and thus effectively earned only 4.3% in interest.[10]

Bancorp argues that even a 4.3% rate is excessive because, under New York law at the relevant time, the maximum legal interest rate for bank liquidations was only 4%. *See* N.Y. Banking Law § 627 (McKinney 1971). Even assuming Bancorp's contention were true,[11] Bancorp's potential recovery would amount to only the difference between a rate of 4.3% and a rate of 4%. For reasons discussed in the

---

[10] We note that Congress has since addressed the issue of the proper rate of post-insolvency interest by granting the FDIC rule-making authority on the question. *See* 12 U.S.C. § 1821(d)(10)(C) (2000); *see also* 12 C.F.R. § 360.7 (2003) (establishing a uniform federal rate of post-insolvency interest).

[11] Arguably the four percent rate applies only to claims presented to New York State's Superintendent of Banks and processed through the state's regulatory machinery. *See* N.Y. Banking Law § 627 (McKinney 1971).

following section, that claim would not be large enough to confer standing upon Bancorp because the outstanding tax claim, owed to the IRS, would offset any potential recovery by Bancorp.[12]

Bancorp makes two further arguments: that the FDIC was not entitled to charge the receivership interest because it did not normally do so; and that the FDIC's choice of the higher interest rate was improper because it was done with the express intention of depleting all of the estate's assets.[13] Bancorp has adduced evidence that it was not the practice of the FDIC at the relevant time to charge post-insolvency interest against the estate. Hovan Dep. at 192-95 ("It was the FDIC policy not to pay interest after the date of closing. There were exceptions to that policy, but I think all of the exceptions were directed by the court. I don't think the FDIC took it upon itself to pay interest after closing unless so ordered by a court."). But internal agency practices do not create legal rights in third parties. *See Clarry v. United States*, 85 F.3d 1041, 1048 (2d Cir. 1996) (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)).

As for the second contention, while the FDIC employees apparently agreed, in an e-mail, to assess interest against the

---

[12] Had the FDIC collected only 4% in interest, instead of 4.3%, the receivership estate would have approximately an additional $800,000, which, even if added to Bancorp's $8 million in waste claims, would not surpass the outstanding tax liability of over $11 million.

[13] The FDIC's assertion, *see* Appellee's Br. at 37, that these arguments were not raised before the District Court is without merit. *See* Pl.'s Statement of Disputed Material Facts in Opp. to Def's Mot. for Summ. J. ¶¶ 38-39.

receivership estate at 9% instead of 4% because if they used the latter figure "there would be excess funds to pay the stockholders," they explained that "[t]his would restrict the FDIC from making the required statement of final disposition to the IRS and would percipitate [sic] the additional claim from the IRS." Herbert Decl., exh. 22. Bancorp conceded before the District Court that "the FDIC . . . charged the interest to eliminate any possible surplus that might exist *that could enure to the benefit of the IRS.*" Pl.'s Statement of Disputed Material Facts in Opp. to Def.'s Mot. for Summ. J. ¶ 39 (emphasis added). Because Bancorp thus acknowledged that none of the funds in question could have, under any scenario, been returned to it, no claim for unjust enrichment can lie.

C. *WASTE CLAIMS*

Bancorp seeks approximately $8 million in claims of corporate waste (aside from its claims regarding the FDIC's interest). However, Bancorp does not dispute that the receivership estate has senior outstanding credit obligations, including a tax liability of approximately $11.7 million. Thus, even if Bancorp's waste claims were meritorious, it would recover nothing. These facts deprive Bancorp of standing. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (discussing standing requirements of "injury in fact," causation, and redressability).

Our conclusion is supported by precedent in at least one other Circuit. In *Herring v. FDIC*, the Ninth Circuit determined that the plaintiffs, shareholders of a failed bank, lacked standing to bring their fraud claims against the FDIC, as receiver of the bank, because the FDIC and other creditors had larger, senior claims outstanding against the receivership estate. 82 F.3d 282, 285 (9th Cir. 1995) ("The shareholders could not recover funds even if their fraud allegations were true; the shareholders thus lack standing to challenge that fraud."). We agree with the reasoning of *Herring*, which

Bancorp does not challenge. Bancorp's only response is to highlight the irony that the IRS's tax deficiency is allegedly premised on the Bank's solvency in 1985 — a central theme to Bancorp's other claims. We cannot discern any legal argument from that observation and thus conclude that the District Court did not err in granting the FDIC summary judgment on Bancorp's waste claims.[14]

IV. CONCLUSION

For the stated reasons, the judgment of the District Court is AFFIRMED.

---

[14] Because the District Court properly granted summary judgment to the FDIC on all claims, Bancorp's jury demand is rendered moot. *See Sweat v. Peabody Coal Co.*, 94 F.3d 301, 306 (7th Cir. 1996).

APPENDIX B

United States District Court,

for the Southern District of New York.

GOLDEN PACIFIC BANCORP, FOR ITS OWN ACCOUNT AND DERIVATIVELY ON BEHALF OF AND IN THE NAME OF GOLDEN PACIFIC NATIONAL BANK,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND IN ITS CAPACITY AS RECEIVER FOR GOLDEN PACIFIC NATIONAL BANK,

Defendant.

95 Civ. 9281 (NRB)

June 26, 2003

OPINION AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Golden Pacific Bancorp ("Bancorp"), for itself and derivatively on behalf of Golden Pacific National Bank ("the Bank"), filed this action against defendant Federal Deposit Insurance Corporation ("FDIC"). Bancorp, the holding company for the Bank, sued the FDIC charging mismanagement in the receivership of the Bank. In our decision filed on December 26, 2002, we granted summary judgment to the FDIC on all issues except two: whether the allocation of expenses incurred in a declaratory judgment action brought by

the FDIC and the repurchase of certain loan assets by the FDIC amounted to either waste or unjust enrichment on the part of the FDIC. *Golden Pacific Bancorp v. FDIC*, 95 Civ. 9281 (NRB), 2002 U.S. Dist. LEXIS 24961, at *54 (S.D.N.Y. Dec. 26, 2002) ("*Golden Pacific 02*").[1] In the same decision, we granted the FDIC leave to renew its summary judgment motion as to those two issues.[2] That renewed motion is the subject of this opinion. Also addressed is a motion submitted by Bancorp, after the FDIC had made its renewed summary judgment motion, to strike the declaration of the FDIC's expert witness Wayne S. Green. For the reasons

---

[1] This is the most recent in a series of decisions in this case. Earlier decisions are included in the record or reported at: Report and Rec. of Mag. Judge Henry Pitman dated July 31, 1997, Def. Memo. 02 Ex. 3; *Golden Pacific Bancorp v. FDIC*, 95 Civ. 9281 (AGS) (HBP), 1997 U.S. Dist. LEXIS 15537 (S.D.N.Y. Oct. 7, 1997); *Golden Pacific Bancorp v. FDIC*, 95 Civ. 9281 (NRB), 2000 U.S. Dist. LEXIS 8240 (S.D.N.Y. June 15, 2000) ("*Golden Pacific 00*"); *Golden Pacific Bancorp v. FDIC*, 273 F.3d 509 (2d Cir. 2001); *Golden Pacific 02*, 2002 U.S. Dist. LEXIS 24961. Throughout this opinion, references to motion papers submitted in connection with the prior summary judgment motion will be designated with the characters "02."

[2] Because Bancorp only created a genuine issue of material fact as to the litigation expenses and loan repurchases by submitting a supplemental declaration in response to a motion by the FDIC to strike affidavits, the FDIC was not given an appropriate opportunity to respond to Bancorp's arguments, and we thus granted the FDIC leave to submit this renewed motion for summary judgment. *Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *36, *43.

stated herein, the FDIC's motion is granted, and Bancorp's motion to strike Green's declaration and accompanying expert report is denied.

I. Background

We have laid out the background of this case in detail in our December 26, 2003 opinion. *Id.* 2002 U.S. Dist. LEXIS 24961 at *2-*11. The facts relevant to the remaining issues may be outlined briefly. In June of 1985, the Office of the Comptroller of the Currency ("OCC") declared the Bank insolvent, and appointed the FDIC as the Bank's receiver. The basis for the insolvency was essentially the Bank's issuance of high-interest securities, known as "yellow certificates" because of the color of the paper on which they were printed. Though the Bank's management claimed the yellow certificates were not liabilities of the Bank, the OCC concluded they were.

Once the OCC declared the Bank insolvent, the FDIC acted in two distinct capacities with respect to the Bank and its affairs. The FDIC acted as the Bank's receiver ("FDIC-R") and, in the FDIC's role as insurer of depository institutions, it bore the duty of making whole the Bank's insured depositors ("FDIC Corporate" or "FDIC-C"). In October of 1985, the FDIC brought a declaratory judgment action to determine the status of the yellow certificates. *FDIC v. Holders of Yellow Certificates Nos. 1 Through 367*, 85 Civ. 8164 (VLB). Bancorp charges that this lawsuit was partly, if not entirely, for the benefit of the FDIC-C, and that legal expenses of approximately $600,000 for this lawsuit were improperly charged to the receivership.

To fulfill its insurance obligations to depositors, the FDIC-C entered into a Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA") with Hong Kong Shanghai Bank ("HKSB") in which HKSB became the paying agent for *Golden Pacific*'s deposits. As part of the transaction, the FDIC wired $115,697,512 to HKSB as an initial payment to

cover the insured deposit liabilities. Also as part of the transaction, HKSB agreed to purchase $61,629,803 of the Bank's assets.

On two separate occasions, the FDIC repurchased from HKSB certain loans that HKSB had originally bought from the FDIC as part of the DITAPA transaction. Though one of these repurchases apparently fell within a 60-day window after HKSB's acquisition of the loans during which HKSB could require the FDIC to repurchase loans, the second repurchase fell outside this window. Bancorp argues that the FDIC's allowing HKSB to make this second repurchase constituted waste. Though the amount of loans involved in the second repurchase is unclear, there is evidence that the total value of the loans repurchased in both transactions was $7.3 million.[3]

The FDIC disputes the substantive claims of unjust enrichment and waste. However, the FDIC also argues that, even if the FDIC erred in its management of the receivership, Bancorp is not entitled to relief because at the conclusion of the receivership, creditors still had higher priority claims than shareholders of the Bank, such as Bancorp, to the remaining proceeds. According to the FDIC's expert report, the receivership still owed significant amounts of post-insolvency interest, or interest that began to accrue after the Bank went

---

[3] The facts concerning the two loan repurchases are based exclusively on a letter from Robert M. Cittadino, an FDIC manager, to Mr. N.P. Snaith at HKSB, in which Cittadino informs Snaith that the FDIC will not be making a third repurchase of loans, and summarizes the history of the loan repurchases between the FDIC and HKSB. Cittadino Letter, Chuang Supp. Decl. '02 Ex. 4.

into bankruptcy.[4] Report of Wayne S. Green, Def. Memo. '02 Ex. 19 ("Green Report"), at 14. Additionally, in October of 1993, the Internal Revenue Service ("IRS") entered into an agreement with the FDIC as receiver for the Bank in which income tax deficiencies stemming from tax years 1980-1988 were abated pursuant to 26 U.S.C. § 7507(a).[5] Closing

---

[4] This interest was owed both on the principal amounts of loans extended by the FDIC-C to fulfill its insurance obligation to insured creditors, and on principal owed to non-FDIC creditors of the Bank. For a more detailed discussion of post-insolvency interest and the FDIC's entitlement to it, *see Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *6-*7, *11-*22.

[5] That provision of the Internal Revenue Code states:

> Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Secretary, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

26 U.S.C. § 7507(a).

Agreement on Final Determination Covering Specific Matters dated October 7, 1993 ("Closing Agreement"), Def. Memo. '02 Ex. 27. The FDIC argues that these outstanding liabilities exceed the amounts that the FDIC would owe were it found to have committed waste and/or unjust enrichment, and thus that Bancorp lacks standing.

II. Discussion

Again, we apply the familiar summary judgment standards outlined in *Golden Pacific '00*, 2000 U.S. Dist. LEXIS 8240, at *9-*10.

A. Renewed Summary Judgment Motion

We agree with the FDIC that it is entitled to summary judgment on Bancorp's remaining claims because Bancorp would not be entitled to any recovery and thus lacks standing to sue. That Bancorp would not be entitled to any recovery is clear. Even if the FDIC were found to have engaged in unjust enrichment and/or corporate waste, the most that Bancorp could recover would be $600,000 in legal expenses for the declaratory judgment action, and $7.3 million for the repurchase of the loans from HKSB, thus, $7.9 million.[6] However, before Bancorp as a shareholder would be entitled to collect this money, some amount of it would be owed to the FDIC in the form of additional post-insolvency interest that

---

[6] Of course, it is reasonable to assume that, even if the second repurchase of the HKSB loans was wrongful, the damages resulting from this act would not amount to $7.3 million, since 1) some amount of loans was repurchased in the first transaction, not the second, and 2) even if the FDIC was unable to recoup the entire repurchase price of these loans in their liquidation, it stands to reason that they recouped some portion of them.

was owed but never paid,[7] and $11,730,753, plus interest, would still be owed to the IRS for the deficiencies it assessed against the receivership estate. Closing Agreement at 1. According to 26 U.S.C. § 7507, these deficiencies were only abated to the extent their collection would diminish the assets necessary for the full payment of depositors. 26 U.S.C. § 7507; Closing Agreement at 2. Thus, should the claims of the depositors be fully satisfied, the full amount of the deficiencies, plus interest, would become due to the IRS. Because these outstanding debts exceed the $7.9 million in possible damages for Bancorp, any recovery by Bancorp is precluded.

This case is thus directly analogous to *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995), *cert. denied*, 519 U.S. 1027 (1996), a Ninth Circuit case in which shareholders of a bank in receivership contested alleged losses of $530,124. *Id.* at 284. The court observed that, though approximately

---

[7] The FDIC asserts that the full amount of unpaid interest calculated at 9%, $13,264,185, Green Report at 16 n.18, would have to be paid before the IRS debt could begin to be paid off, and thus before Bancorp could hope to recover on any claim. The amount of money due from unpaid interest might not be this high, however, because, as we noted in our earlier opinion, the use of a market rate of interest, which would have been approximately 7.42%, would have been preferable to the use of the New York State statutory prejudgment interest rate of 9%. *Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *23. However, given that the effective rate of post-insolvency interest to the FDIC was 4.3%, *id.*, Deposition of Gail Verley, Def. Memo. '02 Ex. 18, at 26, it is clear that some amount of interest would have to be paid off before any money would be available for the IRS.

$367,000 was available for distribution, the FDIC and other creditors had interest claims of approximately $1,500,000 against the receivership, so that, "even if the $530,124 were disallowed, the resulting $603,000 deficiency would still leave the shareholders nothing." *Id.* at 284-85. The court stated: "A party with no interest in the litigation generally has no standing .... The shareholders could not receive funds even if their fraud allegations were true; the shareholders thus lack standing to challenge that fraud." *Id.* at 285. *See also Klare v. United States*, 107 Ct. Cl. 310, 311-13 (Cl. Ct. 1946) (stating that shareholders of bank in receivership were not entitled to recovery of approximately $5,000,000 that they claimed was illegally spent on attorneys' fees and OCC employees' salaries because, before bank shareholders could be entitled to receive any funds from proceeds of receivership, assessment of $19,000,000 had to be repaid).

The claim of the IRS clearly has priority over the shareholders, who are only entitled to the proceeds remaining after all claims have been fully paid.[8] 12 U.S.C. § 194. Thus, just like the plaintiffs in Herring, Bancorp has suffered no real

---

[8] U.S.C. § 194 states:

> From time to time, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. *Id.*

injury due to any alleged mismanagement by the FDIC, and lacks standing to pursue its claims.[9]

Many of Bancorp's arguments in response have been rejected already, and all are without merit. Bancorp attempts to argue that the unpaid post-insolvency interest should not be the basis upon which to deny it standing based on three arguments it has asserted previously: (a) interest accrued unnecessarily due to the FDIC's use of a DITAPA transaction to satisfy its insurance obligation; (b) interest was calculated on funds extended by the FDIC-C to pay post-insolvency interest to the yellow certificate holders; and (c) the interest rate charged was excessive. As we held in our prior opinion, the use of a DITAPA transaction was well within the discretion allowed the FDIC by law to choose how it will run its insurance program, *Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *27-*29, and Bancorp has failed to offer any evidence suggesting that the interest paid on the yellow certificates was excessive or inappropriate,[10] *id.* 2002 U.S.

---

9 The impossibility of any recovery also means that, aside from the lack of standing, Bancorp could not make out a substantive unjust enrichment claim. To recover on a theory of unjust enrichment, "a plaintiff must prove that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983). Because the unpaid post-insolvency interest and the IRS deficiencies stand in the way of any recovery by Bancorp, any enrichment that accrued to the FDIC did not come at the expense of Bancorp.

10 To the extent Bancorp offers a new argument on this point, that argument strains credibility. Bancorp states in its

[Footnote continued on next page]

Dist. LEXIS 24961 at *37-*38. We have already addressed, both in our previous opinion and in this one, Bancorp's argument concerning the FDIC's choice of interest rate. *See Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *23-*24; *supra* note 7.

The new arguments presented by Bancorp are also unconvincing. Bancorp claims the post-insolvency interest only mounted to such high levels because the receivership was kept open too long. Bancorp's contention appears to be that, given that so many of the Bank's assets had been liquidated by November of 1989, the receivership should have been terminated soon after this date, instead of remaining open in some form until November 1, 1995.[11] Green Report

---

[Footnote continued from previous page]
opposition brief: "The FDIC charged interest on the principal and interest paid to the [yellow] certificate holders at the end of the lawsuit over their insurability, and yet the accrual of that interest was caused by the FDIC's refusal to recognize those accounts." Pl. Opp. Mem. at 20. It is misleading to say that the FDIC refused to recognize the claims of the yellow certificate holders. In fact, the FDIC brought the declaratory judgment action specifically to determine the legitimacy of their claims, at a time when the only parties who were advocating the position that their claims should *not* be recognized were certain Bank employees, including Joseph Chuang, who was the former chairman of the Bank and the former President, Chairman, and CEO of Bancorp. It is unseemly for Bancorp to argue that the FDIC should be faulted for the resolution of a dispute that its own CEO created.

[11] To support this assertion, Bancorp cites to a Statement of Condition that shows the Bank with assets of $23,618,669, liabilities of $8,758,150, and equity of $18,860,520, as of

[Footnote continued on next page]

at 16. However, this argument ignores the fact that, though the receivership may have stayed open, post-insolvency interest stopped accruing on the funds extended by the FDIC and other creditors of the Bank in January of 1990, a mere two months after Bancorp claims the bulk of the assets had been liquidated. *Id.* at 13, 14.[12] Thus, an artificially extended period of interest accrual is not the reason unpaid post-insolvency interest today prohibits Bancorp's recovery.

Finally, Bancorp argues that the IRS liability only accrued as a result of a "dispute the FDIC had with the IRS over the 'solvency' of the bank after closing." Pl. Opp. Br. at 21. Bancorp further asserts that the $11 million in tax deficiencies that were the subject of the Closing Agreement "could only have come about if the bank was liquidated while 'solvent,'" and that the FDIC in entering into the agreement "accepted liability for taxes as if [the Bank] were solvent." *Id.* at 22. Bancorp fails to support its argument. Indeed, the section of the Internal Revenue Code under which the Closing Agreement was executed is only applicable when a Bank is *insolvent.* That section applies when a

---

[Footnote continued from previous page]
November 30, 1989. Statement of Condition, Joint Appendix filed in this case during Briefing for Second Circuit's December 7, 2001 Decision, at 1060. On June 21, 1985, the day the OCC shut down the Bank, it had assets of $166 million and liabilities of $172 million. Def. Rule 56.1 Statement of Undisputed Material Facts in Support of '02 Motion for Summary Judgment, at ¶ 20.

12 Having found that Bancorp cannot establish any damages and therefore lacks standing, we need not reach the FDIC's arguments that Bancorp's claims of unjust enrichment and corporate waste fail on the merits.

bank "has ceased to do business by reason of insolvency or bankruptcy," or when a national bank is "found by the Comptroller of the Currency to be insolvent." 26 U.S.C. § 7507(a). Thus, the existence of the Closing Agreement does nothing to resuscitate Bancorp's argument that the FDIC illegally liquidated a solvent bank.

Thus, Bancorp's claims for unjust enrichment and corporate waste fail due to lack of standing, and we grant summary judgment to the FDIC on these issues.

B. Motion to Strike Declaration

Bancorp has moved to strike the declaration of Wayne S. Green, the FDIC's accounting expert. Green prepared an accounting report concerning the Golden Pacific Receivership, which the FDIC submitted in connection with its original motion for summary judgment. The Green Report summarizes the financial history of the receivership, and includes Green's conclusion that at the termination of the receivership, it still owed more than $13 million in post-insolvency interest to various creditors including the FDIC. Green Report at 4-5. Bancorp argues that the Green Report is flawed because, though the Bank was shut down in June of 1985, the accounting procedures employed in the report did not become the general liquidation accounting procedures of the FDIC until January of 1987, according to Bancorp, and Green did not begin working at the FDIC until August of 1989.

We note as an initial matter that the conclusions of the Green Report are essentially irrelevant to our holdings in both our current opinion and our previous opinion concerning the FDIC's motion for summary judgment. In concluding in our previous opinion that the interest the FDIC paid itself was appropriate, we used data from the Federal Reserve web site to calculate the average market rate of interest during the time the FDIC had extended its funds, and compared that average rate to the uncontroverted testimony of Gail

Verley, an FDIC manager, concerning the effective rate of interest earned by the FDIC on its funds. *Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *23-*24; Federal Reserve Release: Selected Interest Rates, http://www.federalreserve.gov /releases/hl5/data/wf/tcmly.txt (Dec. 11, 2002); Deposition of Gail Verley, Def. Memo. '02 Ex. 18, at 26. Our conclusion in this opinion that Bancorp lacks standing to pursue its remaining claims does not depend on the Green Report's calculation of post-insolvency interest still outstanding as of the close of the receivership, since the IRS's claim for $11,730,753 plus interest due to tax deficiencies, evident from the Closing Agreement and undisputed in amount by Bancorp, more than outweighs any possible recovery by Bancorp. That said, we find that Bancorp's substantive attack on the Green Report is wholly without merit.

The Federal Rules of Civil Procedure require that affidavits in support of a motion for summary judgment "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Moreover, the Federal Rules of Evidence require that Green offer "technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue" and that Green be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. To meet the requirements of Fed. R. Evid. 702, Green's testimony and report must be "not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993). Based on the record before us, Green meets these tests.

Green is a Senior Financial Management Analyst and a Team Leader of the Forensic Accounting Unit in the FDIC's Division of Resolution and Receivership in Dallas, Texas, with 24 years of combined experience in banking and accounting, and thirteen years of specific liquidation accounting experience. Supplemental Decl. of Wayne S. Green

dated April 10, 2003 ("Green Supp. Decl."), at ¶¶ 1, 10-11. While at the FDIC, he reviewed and analyzed dozens of receiverships. *Id.* at ¶ 11. In preparing his expert report, he considered documents and financial statements covering the entirety of the *Golden Pacific* receivership. *Id.* at ¶ 4. Thus, Green is clearly familiar with both liquidation accounting procedures and the Golden Pacific receivership, and this familiarity forms the basis for his report.

Bancorp has not identified any specific difference, let alone a meaningful difference, between the formulation of the accounting rules before and after January of 1987. Given that the manual itself is a collection of FDIC accounting procedures that in many instances had been in existence since the early 1980s, Green Supp. Decl. at ¶ 6, Bancorp bears the burden of identifying specific procedures that changed, and showing why those changes are significant. Bancorp has not met that burden.[13] Nor has Bancorp raised, at this late date, after exhaustive discovery and briefing on three separate

---

[13] Bancorp's citation to *Douglas v. Beneficial Finance Company*, 334 F. Supp. 1166 (D. Alaska 1971) is inapposite specifically because Bancorp fails to identify any difference between the pre-and post-1987 accounting rules. We read Douglas, in which the court struck a document that "purported to be an 'operating manual'" because it lacked foundation and because there was "nothing to indicate that the manual is current," *id.* at 1169, to stand for the proposition that irrelevant evidence lacking a foundation is excludable, and we have no quibble with that proposition. However, plaintiff has failed to make such a showing here-without demonstrating differences in the accounting procedures after January of 1987, Bancorp has failed to show that the Green Report is irrelevant or that it lacks foundation.

summary judgment motions, any lack of qualifications on the part of Green.[14] Without any specificity as to the differences

---

[14] Bancorp apparently did not take Green's deposition or otherwise seek testimony concerning his expert qualifications or opinions. Def. Reply Memo. in Further Support of Summary Judgment at 5 n.7. Bancorp asserts that it did not believe Green's testimony to be relevant, because Judge Schwartz early on in this case declared, according to Bancorp, that "the receiver's knowledge of the receivership's solvency was the proper issue, rather than the receiver's entitlement to post-insolvency interest." Pl. Reply Memo. to Strike Decl. at 9. Bancorp goes on to assert that "if Judge Schwartz's ruling is the law of the case, the Green Report is irrelevant." *Id.* at 10. We agree with Bancorp insofar as we believe, as we noted *supra*, that the Green Report is for all practical purposes irrelevant to the fundamental holdings in both our previous opinion and this one. However, in response to Bancorp's contention that we somehow changed the law of the case in this proceeding, we reiterate that when the mandate of a higher court is not involved, the law of the case doctrine is a discretionary one. *Perillo v. Johnson*, 205 F.3d 775, 780-81 (5th Cir. 2000); *Golden Pacific '02*, 2002 U.S. Dist. LEXIS 24961, at *22 n.11. We also reiterate our view that our December 2002 ruling in this case did not represent a change in the law of the case, because, among other reasons, Judge Schwartz's ruling in October of 1997 was on a motion to dismiss, not on summary judgment, and because his holding only allowed the case to proceed on the assumption that the FDIC had liquidated a bank it knew to be solvent "in a deliberately wasteful and self-serving manner." *Golden Pacific Bancorp v. FDIC*, 95 Civ. 9281 (AGS)

[Footnote continued on next page]

and, specifically, the shortcomings of the post-1987 procedures, Bancorp's argument is not persuasive with this court.[15]

Based on his understanding of liquidation accounting procedures, Green is competent to testify and qualified as an

---

[Footnote continued from previous page]
(HBP), 1997 U.S. Dist. LEXIS 15537, at *6 (S.D.N.Y. Oct. 7, 1997).

15 For completeness, we briefly address Bancorp's remaining arguments. Bancorp challenges Green's qualifications by citing supposed conflicts between his conclusions and those of Michael Hovan, a former field bank examiner for the FDIC. Bancorp claims that Hovan testified the FDIC could not legally liquidate a solvent bank, while Green stated the FDIC need not concern itself with solvency, and that FDIC policy prohibited post-insolvency interest, while Green "states otherwise." Pl. Reply Memo. to Strike Decl. at 6-7. Bancorp offers no citations for Green's purported conflicting statements, and we cannot find them in the record. In any event, the possibility of grist for cross-examination is not sufficient for a successful motion to strike.

Finally, Green's employment by the FDIC does not require us to strike his declaration. "Courts routinely permit expert testimony by parties, employees, and others with financial and other plain interests in the outcome of the litigation," as long as the potential for assistance to the trier of fact is not outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury." Knowledge *Based Techs. v. IBM*, 96 Civ. 9461 (JSR), 1998 U.S. Dist. LEXIS 4602, at *2-*3 (S.D.N.Y. Apr. 8, 1998). These dangers do not present a significant concern here.

expert, and we deny Bancorp's motion to strike the declarations.

CONCLUSION

Defendant's motion for summary judgment as to the issues remaining in the case is granted. Plaintiff's motion to strike the Green Declaration is denied. The Clerk of the Court is respectfully requested to close the case.

IT IS SO ORDERED.

DATED: June 26, 2003

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court

for the Southern District of New York

GOLDEN PACIFIC BANCORP, FOR ITS OWN ACCOUNT AND DERIVATIVELY ON BEHALF OF AND IN THE NAME OF GOLDEN PACIFIC NATIONAL BANK,

Plaintiff

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND IN ITS CAPACITY AS RECEIVER FOR GOLDEN PACIFIC BANK,

Defendant.

95 Civ. 9281 (NRB)

December 24, 2002.

OPINION AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Golden Pacific Bancorp ("Bancorp"), for itself and derivatively on behalf of Golden Pacific National Bank ("the Bank"), filed this action against defendant Federal Deposit Insurance Corporation ("FDIC") in both its corporate capacity ("FDIC-C") and in its capacity as receiver of the Bank ("FDIC-R"), asserting claims for (1) unjust enrichment, (2) breach of fiduciary duty, (3) corporate waste, and (4) an accounting, in connection with the defendant's management of the Bank's receivership and liquidation commencing on

June 21, 1985. Now pending is defendant's motion, pursuant to Fed. R. Civ. P. 56, for summary judgment on all of these claims.

I. Background[1]

A. Golden Pacific National Bank and the Receivership

Golden Pacific National Bank was founded in 1977. By 1985, in addition to its principal place of business at 241 Canal Street, in Chinatown, the Bank had three branch offices in the New York metropolitan area. The Bank's President during much of that time was Kuang Hsung (Joseph) Chuang, who was also President, Chairman, and CEO of Bancorp, the holding company for the Bank.[2] Theresa Shieh was Secretary and Treasurer of the Bank and Vice President and Treasurer of Bancorp.

---

1 Unless otherwise stated, the facts herein are drawn from the parties' submissions in connection with this motion, including the Memorandum of Law of Defendant Federal Deposit Insurance Corporation in Support of Motion for Summary Judgment ("Def. Memo."), Defendant's Rule 56.1 Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Def. Rule 56.1 Statement"), Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Pl. Memo."), and Plaintiff's Statement of Disputed Material Facts in Opposition to Defendant's Motion for Summary Judgment ("Pl. Rule 56.1 Statement").

2 Bancorp's pleadings refer to Dr. Chuang alternately as "Dr. Chuang" and "Mr. Chuang." We will refer to him as Dr. Chuang.

From as early as 1979 until June 1985, the Bank offered its customers high-interest certificates that were called "yellow certificates" or "yellow CD's" because they were printed on yellow paper. The Bank used the proceeds of these yellow certificates to purchase assets that were not recorded on the Bank's books.

On June 17, 1985, examiners from the Office of the Comptroller of the Currency ("OCC") and the FDIC initiated an investigation into the yellow certificates and the impact of those certificates on the Bank's financial picture. The Bank argued to the examiners that as of June 21, 1985, it had assets in excess of $166 million and liabilities of $157 million. The OCC concluded, however, that when the $15 million in liabilities for the yellow certificates were added to the $157 million in other liabilities, the Bank's liabilities outweighed its assets by about $6 million.[3] On June 21, 1985, the OCC declared the Bank insolvent, closed the Bank, and appointed the FDIC as receiver to liquidate the Bank's assets.

To fulfill its insurance obligations, the FDIC decided to hold an auction inviting other banks, who presumably saw value in acquiring the ongoing relationships with Golden Pacific's depositors, to bid for the right to become the paying agent for Golden Pacific's deposits. When the FDIC held this auction, the Hong Kong and Shanghai Banking Corporation ("HKSB") was the only bidder. Its bid of $6,351,276 won, and on June 26, 1985, five days after the closing of the Bank, the FDIC entered into a Deposit Insurance Transfer and Asset Purchase Agreement with HKSB. As part of this transaction, HKSB also agreed to purchase $61,629,803 of

---

[3] The OCC did not include in this calculation the assets backing the yellow certificates, because those assets, or some portion of those assets, were not held in the Bank's name.

Golden Pacific's assets. Also as part of the transaction, on June 28, the FDIC-C wired $115,697,512 to HKSB as an initial payment to cover the insured deposit liabilities.[4]

Bancorp argues that, if the liabilities on the yellow certificates were excluded from the calculation, for much if not all of the period during which the Bank was in receivership, its assets continued to outweigh its liabilities. A balance sheet apparently prepared by the FDIC on June 21, 1985, which apparently did not include the liabilities on the yellow certificates, shows the Bank having $9,138,000 in "Equity Capital and Reserves." Joint Appendix filed in this case with United States Court of Appeals for the Second Circuit ("J.A."), 1739. Similarly, a Touche Ross & Co. report dated November 22, 1985 includes a September 30, 1985 balance sheet showing an "adjusted equity" of $16,545,483 without the liabilities on the yellow certificates. J.A. at 1744.

During the course of the receivership, the FDIC-R paid to the FDIC-C a total of $11,204,166 in interest denominated by the parties as post-insolvency interest. The FDIC-C asserted this claim to post-insolvency interest because it expended its own funds to fulfill its insurance obligation, and it was thus subrogated to the rights of the insured depositors.[5] The FDIC calculated post-insolvency interest from the date of the expenditure until the date of repayment by FDIC-R at a rate of 9% based on the amount of funds the FDIC-C had

---

[4] Eventually, FDIC-C would expend $146,410,273 to fulfill its insurance obligations. Report of Wayne S. Green, Def. Memo. Exh. 19, at 9.

[5] It should be noted that there is no dispute about the repayment by FDIC-R to FDIC-C of the principle amount of the deposits paid by FDIC-C.

paid to insured depositors.[6] Using this method of calculating post-insolvency interest, the FDIC claimed it was owed a total of $23,020,785. The balance beyond the $11,204,166 was not paid to the FDIC because the receivership lacked the funds.

Following its appointment as receiver, the FDIC-R sued Dr. Chuang, Ms. Shieh, and others to recover funds allegedly diverted from the Bank. Compl. in *FDIC v. Chuang*, No. 85 Civ. 7468 (SWK) (S.D.N.Y. filed Sept. 20, 1985). The defendants in that suit counterclaimed against the FDIC, asserting breach of contractual and fiduciary duty, misappropriation of funds, loss of business opportunities, and other claims. In May of 1988, Bancorp and the FDIC settled their respective claims in that suit. Bancorp agreed to pay the FDIC $14,625,000 and acquire certain assets of the receivership in return.

Additionally, in October of 1985, the FDIC-C brought a declaratory judgment action to determine the status of certain transactions entered into by the Bank ("the yellow certificates lawsuit"). Compl. in *FDIC v. Holders of Yellow Certificates Nos. 1 Through 367*, 85 Civ. 8164 (VLB) (S.D.N.Y. Mar. 4, 1987). Bancorp alleges that the FDIC charged legal expenses in this action to the receivership.

Bancorp challenges other expenses that the FDIC incurred as well as other decisions the FDIC made in the administration of the receivership. First, Bancorp asserts that the FDIC paid excessive interest to holders of the yellow cer-

---

[6] The FDIC-C first extended funds to depositors on June 28, 1985, and the FDIC-R finished making its repayments to creditors on January 10, 1990. Report of Wayne S. Green, Def. Memo. Exh. 19, at 8, 14 n.12.

tificates after the closing of the Bank. Supplemental Declaration of Joseph Chuang ("Chuang Supp. Decl."), ¶ 5. Second, Bancorp challenges the FDIC's closing of Dr. Chuang's law office, which was located in the Bank building, for some time during the receivership. As part of the May 1988 settlement agreement between Bancorp and the FDIC, the FDIC credited Bancorp $200,000 to settle Bancorp's claim that the closing of this office was wrongful. Third, Bancorp also complains that the FDIC failed to pursue a lawsuit against a former employee for embezzlement and check-kiting. *Id.* at ¶ 7. Fourth, Bancorp alleges the FDIC failed to collect rent when the FBI occupied space in the Bank building. *Id.* at ¶ 9. Fifth, Bancorp asserts the FDIC repurchased certain assets from HKSB that it was not obligated to repurchase. *Id.* at ¶ 10.

Finally, we note that Dr. Chuang and Ms. Shieh were convicted on January 18, 1989 on 22 counts relating to the sale of the yellow certificates and misrepresentations to regulatory officials.

B. Procedural Posture

In October of 1995, Bancorp commenced the present action. In May of 1996, the FDIC moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to the Federal Tort Claims Act and the Administrative Procedures Act. In response to that motion, Judge Schwartz ruled that the FDIC's conduct is actionable only to the extent that it decided to proceed with a liquidation of a bank it had learned was solvent, and its actions were "deliberately wasteful and self-serving." *Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281 (AGS) (HBP), 1997 U.S. Dist. LEXIS 15537, at *6 (S.D.N.Y. Oct. 7, 1997) (hereinafter "*Golden Pac. Bancorp, Schwartz Opinion*"). If it could be proven that the FDIC's action were "deliberately wasteful and self-serving," then they would "not fall into the category of 'the permissible exercise of policy judgment' exempted from judicial review"

under the Administrative Procedures Act. *Id.* at *7 (quoting *Berkovitz v. United States*, 486 U.S. 531, 539 (1988)).

On December 15, 1999, after the parties had exchanged discovery, the FDIC moved for summary judgment. The FDIC argued that the action was barred by the 1988 settlement agreement in *FDIC v. Chuang* and that the statute of limitations for Bancorp's claims had expired. This court found for the FDIC on both grounds. *Golden Pac. Bancorp v. FDIC*, No. 95 Civ. 9281 (NRB), 2000 U.S. Dist. LEXIS 8240, at *13, *18 (S.D.N.Y. June 15, 2000). The Second Circuit Court of Appeals reversed and remanded, finding that the 1998 agreement covered only claims against the FDIC based on the OCC's closing of the bank, not the FDIC's subsequent management of the receivership, and that the statute of limitations period had not run, because it was tolled by the fiduciary relationship between Bancorp and the FDIC, and because the cause of action accrued when post-insolvency interest was actually paid, not when it began to accrue. *Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 516-520 (2d Cir. 2001). We now consider the defendant's arguments that we found unnecessary to reach previously, namely that none of Bancorp's claims can be supported as a matter of law.

II. Discussion

We apply the familiar summary judgment standards. *See Golden Pac. Bancorp v. FDIC*, 2000 U.S. Dist. LEXIS 8240, at *9-*10.

A. Unjust enrichment

Bancorp claims that the FDIC-C was unjustly enriched by charging post-insolvency interest to the receivership estate. Pl. Memo. at 15. Bancorp first argues that the FDIC-C was not entitled to interest on its payments to depositors because it did not properly obtain subrogation rights from the Bank's prior creditors. *Id.* Second, Bancorp appears to argue that, even if the FDIC-C initially had the right to interest,

the FDIC should have halted the receivership when it realized a "surplus" was probable, and thus that seeking interest payments that accrued after that point resulted in unjust enrichment to the FDIC. *Id.* at 18. Third, Bancorp argues that the interest rate the FDIC used was excessive. *Id.* Fourth, Bancorp argues that the FDIC-C inappropriately charged its own corporate expenses to the receivership estate. First Amended Compl. ("Am. Compl."), ¶ 81.

To recover on a theory of unjust enrichment, "a plaintiff must prove that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983).

We deal first with Bancorp's argument that the FDIC did not properly attain its subrogation rights. Specifically, Bancorp asserts: "It is the 'condition precedent' of the bank's insolvency that triggers the FDIC's duty to pay insurance proceeds to the insured depositors. Accordingly, whether, the Bank was solvent at the time the FDIC exercised its duties is a genuine issue of material fact, precluding summary judgment." *Id.* at 15. In other words, Bancorp contends, if the Bank was not truly insolvent, then the FDIC-C should not have made any payments to insured depositors, and thus was not entitled to be subrogated to the depositors' rights.

We note at the outset that Bancorp's contention that the FDIC needed to redetermine whether a bank was insolvent before paying insured depositors would intrude on the role of Comptroller of the Currency, who is vested with the responsibility to make such an investigation before a bank is closed.

12 U.S.C. § 191 (1959).[7] Nevertheless, Bancorp argues that the FDIC-C was not permitted to advance funds on the Bank's behalf "unless the bank had an 'inability to meet the demands of its depositors.'" *Id.* at 16.

Bancorp takes the "inability to meet the demands of depositors" language from that section of the Federal Deposit Insurance Act, as it existed in 1985, that governed the FDIC-C's obligation to make payments to insured depositors. That language read: "Whenever an insured depository institution . . . shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g) of this section . . . ."[8] 12 U.S.C. § 1821(f) (1982). Rather than supporting Bancorp's case, the statutory language undermines it as it makes clear that the FDIC has no discretion in fulfilling its

---

[7] The D.C. Circuit Court of Appeals has previously ruled that the Comptroller's decision to close the Bank was within the discretionary function exemption of the Federal Tort Claims Act, and thus not reviewable. *Golden Pac. Bancorp v. Clarke*, 837 F.2d 509, 511-12 (D.C. Cir. 1988). This decision formed the basis for Judge Schwartz's ruling that Bancorp was collaterally estopped in the present action from arguing that the Bank was not insolvent at the time of closure. *Golden Pac. Bancorp, Schwartz Opinion*, 1997 U.S. Dist. LEXIS 15537, at *7-*8. It would thus appear that Bancorp's suggestion that the FDIC should re-evaluate the solvency of the Bank is an effort to make an end-run around the D.C. Circuit and Judge Schwartz.

[8] Subsection (g) related only to the FDIC's subrogation for the rights of the depositors of the closed bank. 12 U.S.C. § 1821(g) (1982).

duty to meet the demands of depositors. Rather, the payment to insured depositors is mandatory once a liquidation begins.[9]

There is, of course, good reason to require the FDIC to pay insured depositors immediately, apart from avoiding duplicating the function of the OCC. When a bank has failed, time is of the essence to maintain confidence in the banking system. *See Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir. 1982) (noting importance of speed in fulfilling FDIC's insurance obligation in order to promote confidence in banking system). Re-examining the solvency of a bank declared insolvent by the OCC would waste time while potentially fueling investor and consumer unease.

Further, it is clear under the applicable Federal Deposit Insurance Act in existence at the time that once the FDIC-C fulfilled its insurance obligation to depositors, it was subrogated to their rights: "The [FDIC], upon the payment to any depositor as provided in [12 U.S.C. § 1821(f)], shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment." 12 U.S.C. § 1821(g) (1982). Here, it is undisputed that the FDIC-C fulfilled its insurance obligation to depositors. Thus, the only remaining question is whether interest payments are among the "rights of the depositor" under the language of 12 U.S.C. § 1821(g) and thus whether the FDIC-C was entitled to interest. We answer this question in the affirmative.

---

[9] Under the statutes in existence at the time of the Bank's closing, a liquidation began when the Comptroller of the Currency became "satisfied of the insolvency of a national banking association." 12 U.S.C. § 191 (1959). At such time, the Comptroller was to "appoint a receiver, who shall proceed to close up such association." *Id.*

The general right of a creditor of a national bank in default to receive post-insolvency interest on principal amounts owed to the creditor was established as far back as 1876, in the case of *Nat'l Bank of the Commonwealth v. Mechanics Nat'l Bank*, 94 U.S. 437 (1876). There, the Supreme Court held: "The interest lawfully accruing upon each of [the creditors' claims] was as much a part of it as the original debt. The creditor had the same right to the payment of the one as of the other." *Id.* at 439-40. Though this case does not deal specifically with the rights the FDIC inherits under the Federal Deposit Insurance Act (as neither were then in existence), it does demonstrate that creditors' rights in a liquidation do include the right to interest.

Subsequent cases, however, do address the rights of the FDIC to interest as subrogee. In *First Nat'l Bank in Humboldt*, 523 N.W.2d 591 (Iowa 1994), the Supreme Court of Iowa held that the right to post-insolvency interest was one of the rights to which the FDIC-C became entitled when it acted to fulfill its obligation to depositors. *Id.* at 595. Under such circumstances, the Court concluded, "Congress not only authorized FDIC corporate to recover interest on the use of money from the insurance fund, but in fact made it FDIC corporate's fiduciary duty to do so." *Id.* Though we recognize that a state court's interpretation of federal law is not binding, *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D. N.Y. 1992), we nevertheless find the reasoning of the Court in *First Nat'l Bank in Humboldt* persuasive, and adopt it here.

As that Court noted, the funds that the FDIC advances to fulfill its insurance obligations to depositors come from its bank insurance fund, a fund that is financed by assessments on the deposits of insured banks. *First Nat'l Bank in Humboldt*, 523 N.W.2d at 594; 12 U.S.C. §§ 1821(a)(5), 1817(b). The Court continued:

> When these insurance funds are not "otherwise employed" in securing the accounts of

> insured depositors, the [Federal Deposit Insurance Act] requires them to be "invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States." [12 U.S.C.] § 1823(a)(1). This provision reflects Congress' intent that money in the deposit insurance fund bear interest in order to protect the fiscal integrity of the fund ... When insurance funds are diverted from investments to finance the liquidation or purchase and assumption of a failed bank, the same concerns for fiscal integrity apply.

First Nat'l Bank in Humboldt, 523 N.W.2d at 594-95.[10]

---

[10] Bancorp attempts to differentiate *First Nat'l Bank* in *Humboldt* by arguing that in that case, "post-insolvency interest was recoverable because it was permitted by a *contractual* arrangement between the parties." Pl. Memo. at 15. However, the contract in *First Nat'l Bank* in *Humboldt* that provided for the payment of interest was between the FDIC in its corporate capacity and the FDIC in its capacity as receiver, not between the FDIC and the stockholders of the failed bank. 523 N.W.2d at 593. For the existence of the contract to be relevant, the stockholders would have had to be parties to it. Only then could it be said to have relieved the FDIC of its fiduciary duty. The contract in *First Nat'l Bank* in *Humboldt* was simply a necessary measure to govern the application of funds gained from the liquidation of assets that the FDIC-C was acquiring from the FDIC-R. *Id.* The teaching of the Supreme Court of Iowa-that applying those funds in part to the payment of post-insolvency interest did not violate whatever duties might have existed between the

[Footnote continued on next page]

Moreover, the Eighth Circuit's decision in *FDIC v. Citizens State Bank of Niangua*, 130 F.2d 102 (8th Cir. 1942), is instructive. In that case, the Commissioner of Finance of the State of Missouri was attempting to distribute surplus funds to the failed bank's stockholders instead of paying interest to creditors, including the FDIC. *Id.* at 103. The relevant language of the predecessor of the Federal Deposit Insurance Act, the Federal Reserve Act, was nearly identical to the language at issue here. It stated that the Corporation, "upon the payment of any depositor. . ., shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment." 12 U.S.C. § 264(1)(7) (1940). The Commissioner argued that the "to the extent of such payment" language limited the FDIC to recovering only the sum that it had paid out. *Citizens Bank of Niangua*, 130 F.2d at 103. Rejecting the Commissioner's argument, the Court concluded that the rights attained by the FDIC "obviously include[] the usual and inherent incident of interest for the period that the bank's obligation for the deposit remains unsatisfied as against the Corporation, if a surplus is available for that purpose." *Id.* at 104. As in *First Nat'l Bank in Humboldt*, the Court noted Congress's intent to protect the finances of the insurance fund, observing that "neither the purpose of the [Federal Reserve Act] nor its legislative history evidences any philanthropic intent, in a situation such as this, to allow the use of the [FDIC's] funds to become a source of profit to stockholders of a defaulting bank, at the expense of the [FDIC]." *Id.* at 104 n.6.

In light of these decisions, and in view of the importance of maintaining the bank insurance fund, we hold that the

---

[Footnote continued from previous page]
FDIC and the bank's stockholders-is indeed informative in our case.

FDIC is entitled to the payment of interest on the funds that it extends when it is subrogated to the rights of depositors.

We now consider Bancorp's second claim of unjust enrichment, namely that the FDIC had a duty to halt the liquidation and restore the Bank's assets to the stockholders because it knew or should have known that the Bank's assets outweighed its liabilities. Pl. Memo. at 18. If the FDIC had such a duty, Bancorp argues, then it was unjustly enriched when it continued the liquidation and the payment of interest to itself. *Id.*

Bancorp asserts that the FDIC's duty is based on the text of the National Banking Act. "There are significant factual issues as to whether the FDIC properly exercised its statutory duty under 12 U.S.C. Section 197 to return the assets to the shareholders when a 'surplus' was probable." Pl. Memo. at 18. Bancorp is simply incorrect. Section 197 directs the FDIC to call a shareholders meeting "when . . . there has been paid to each and every creditor of [the bank in receivership] . . . the full amount of such claims, and all expenses of the receivership." § 197(a). At that meeting, the FDIC is required to take steps to transfer any remaining assets back to the stockholders. *Id.*

The triggering event for a return of the remaining assets to the shareholders never occurred here. While Bancorp disputes the FDIC's entitlement to interest, there is no dispute that at the conclusion of the receivership, $13,264,185 in interest claims were still outstanding against the Bank. Report of Wayne S. Green ("Green Report"), Def. Memo. Exh. 19, at 16 n.18. Thus, the FDIC never called the shareholders meeting mentioned in the statute because the claims of all the creditors were never satisfied. For the reasons discussed above, we have already resolved the dispute over the FDIC's legal entitlement to interest in favor of the FDIC. As this second aspect of the FDIC's unjust enrichment claim rests upon the first, we reject it as well.

Thus, we hold that the FDIC-C did not enrich itself unjustly when it paid itself some portion of the interest for the funds it had extended.[11]

---

[11] Bancorp might argue that this holding violates the law of the case doctrine because it departs from the view of Judge Schwartz in his 1997 opinion in this case. In that opinion, Judge Schwartz wrote that the FDIC's contentions "that it only took interest to which it was statutorily entitled and that it had no duty to maximize shareholder return" did not "answer plaintiff's two main contentions," namely that the FDIC proceeded with a liquidation after learning that the Bank was "solvent," and that the FDIC's management of the liquidation "amounted to wrongful appropriation." *Golden Pac. Bancorp, Schwartz Opinion*, 1997 U.S. Dist. LEXIS 15537, at *9. There are two responses to this. First, the law of the case doctrine does bind us at this juncture. When the mandate of a higher court is not involved, the doctrine is a purely discretionary one. *Perillo v. Johnson*, 205 F.3d 775, 780-81 (5th Cir. 2000); *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950); 6 James Wm. Moore *et al.*, Moore's Federal Practice § 134.21[1] (Matthew Bender 3d ed.). Second, we do not believe that there is as much of a distinction as Bancorp might have us believe between Judge Schwartz's reading of the law and our own. We must bear in mind that Judge Schwartz was considering Bancorp's arguments at the motion to dismiss stage, and was thus obligated to give full credit to Bancorp's allegations of wasteful and self-serving conduct. With the benefit of a wealth of evidence to which Judge Schwartz did not have access, we have obviously concluded that these allegations are in many instances unfounded.

We address Bancorp's contention that the interest rate the FDIC used was excessive and constituted unjust enrichment. Pl. Memo. at 12, 18. To compute the post-insolvency interest it was owed, the FDIC-C used the New York statutory pre-judgment interest rate of 9%. Def. Rule 56.1 Statement at ¶ 59; *see also* N.Y. C.P.L.R. § 5004. However, because the FDIC-C was only paid a portion of the total interest calculation, the effective interest rate it was actually paid was much lower than 9%.[12] Uncontroverted evidence establishes that the effective rate of interest to the FDIC was 4.3%. Deposition of Gail Verley, Def. Memo. Exh. 18, at 26. Interest of 4.3% is well within the FDIC's cost of funds.[13] The weekly average interest rate on one-year constant maturity Treasury bills from the day the FDIC first expended funds to depositors, June 28, 1985, to the day payments to creditors

---

12 Using the 9% rate, the FDIC-C would have been entitled to post-insolvency interest of $23,020,785. Green Report at 14. However, the FDIC-C was only paid $11,204,166. *Id.* at 16 n.18.

13 We have in past decisions explained the relevance of a party's actual cost of funds over fixed state statutory rates. *Merchant v. Lymon*, 87 Civ. 7199 (BDP) (NRB), 1995 U.S. Dist. LEXIS 4676, at *27 (S.D.N.Y. Apr. 11, 1995); *Hollie v. Korean Air Lines Co.*, 834 F. Supp. 65, 69-71 (S.D.N.Y. 1993). Here, as the above discussion demonstrates, the effective rate of interest to the FDIC was well below both the FDIC's actual cost of funds and the statutory rate the FDIC chose.

concluded, January 10, 1990, was 7.42%.[14] Federal Reserve Release: Selected Interest Rates, http://www.federalreserve.gov/releases/h15/data/wf/tcmly.txt (Dec. 11, 2002). Thus, we conclude that the FDIC paid itself interest at a reasonable rate.[15]

Payment of post-insolvency interest is not the sole basis of Bancorp's unjust enrichment claim, however. Bancorp included in its Amended Complaint the allegation that "the FDIC-C . . . passed off corporate expenses to be borne by the receivership estate," and cited as an example $600,000 in legal costs that the FDIC-C incurred in its declaratory judgment action in October 1985 concerning the yellow certificates. Am. Compl. at ¶ 81. The FDIC makes no mention of this aspect of the unjust enrichment claim in the section of its brief dealing with this claim, which is essentially based on

---

[14] Not only does this rate represent a fair approximation of the FDIC's cost of funds, it is also the federally mandated rate for money judgments. 28 U.S.C. § 1961(a).

[15] In this context, we are mindful of the current posture of the case. When considering whether judicial review of the FDIC's action is precluded by the Administrative Procedures Act, Judge Schwartz held that *if* the FDIC "conducted [the] liquidation [of the Bank] in a deliberately wasteful and self-serving manner, then those decisions do not fall into the category of 'the permissible exercise of policy judgment' exempted from judicial review" by the Act. *Golden Pac. Bancorp, Schwartz Opinion*, 1997 U.S. Dist. LEXIS 15537, at *6-*7 (quoting *Berkovitz*, 486 U.S. at 537 (1988)). Given the significant difference between the effective rate of interest paid to the FDIC-C and the relevant market rates, no reasonable juror could find the interest paid to the FDIC-C to be "deliberately wasteful and self-serving."

the same facts as Bancorp's corporate waste claim. For the reasons discussed *infra* in Section II.C, we decline to grant summary judgment at this stage of the proceeding on this aspect of this claim.

B. Breach of Fiduciary Duty

Bancorp claims that the FDIC-C violated its fiduciary duty by proceeding with the liquidation of a bank that it knew to be "solvent" and by choosing to fulfill its insurance obligations by entering into a Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA transaction") with HKSB.[16] Am. Compl., ¶ 88(d), (e), and (h). We have al-

---

16 In its brief, the FDIC does not address certain aspects of Bancorp's breach of fiduciary duty claim. Bancorp asserts in its complaint that the FDIC-C violated its fiduciary duty by planning the Bank's receivership before the Bank had been declared insolvent and by participating in the pre-closure examination of the Bank in bad faith. Am. Compl., ¶ 88(a)-(c). These aspects of the fiduciary duty claim could only have harmed the Bank if they led to the Comptroller closing the Bank when it was in fact solvent. However, based on Judge Schwartz's opinion in this case, Bancorp is precluded from arguing that the Bank was in fact solvent when it was closed. *Golden Pac. Bancorp, Schwartz Opinion*, 1997 U.S. Dist. LEXIS 15537, at *7-*8 (citing *Golden Pac. Bancorp. v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988)). The FDIC has also not addressed specifically Bancorp's arguments that the FDIC-C and FDIC-R were aware that shareholders of the Bank "were eager to re-enter banking" and yet withheld bank assets from them, and that, had the FDIC not aided in the closing of the Bank, it would have benefitted from "members of the Chinese community relocating during the 1990's, for example, as a result of the repatriation of Hong Kong to

[Footnote continued on next page]

ready dealt with Bancorp's contention that the FDIC proceeded with the liquidation of a bank that it knew to be "solvent." *See* Section II.A *supra*. We consider here Bancorp's argument concerning the DITAPA transaction.

Bancorp argues in its complaint that the "FDIC-C selected the most expensive method of resolution, and the most damaging to the interests of the shareholders, by placing all assets in liquidation while transferring the valuable business of deposit taking and management with HKSB." Am. Compl. at ¶ 88(h).

Under the DITAPA transaction used by the FDIC, the FDIC-C sold to another bank, HKSB, the right to become the paying agent for the insured depositors of *Golden Pacific*. Def. Rule 56.1 Statement at ¶ 37. As noted earlier, HKSB also agreed to buy many of Golden Pacific's assets. *Id*. Under this arrangement, HKSB was not assuming any liabilities

---

[Footnote continued from previous page]
China." Am. Compl., ¶ 88(f), (g). These components of the claim are essentially already a part of Bancorp's argument that FDIC should have ceased the liquidation of a "solvent" bank. If the FDIC was not required to halt the liquidation because it knew or should have known that the Bank's assets outweighed its liabilities, then it was not required to act on shareholders' particular "eagerness" to re-enter the banking industry, or anticipate any influx of banking business from Chinese immigrants.

We also note here that in its complaint, Bancorp asserts that the FDIC-R owes the Bank's shareholders a fiduciary duty based on its receivership function under the National Bank Act, and that the FDIC-C owes such a duty based on its status as operating head of all FDIC-Rs. Am. Compl. at ¶ 73. The FDIC apparently does not dispute these contentions.

toward the depositors, but instead acting as paying agent on behalf of the FDIC-C—it presumably saw some potential to develop a longer term relationship with Golden Pacific's customers. *Barry S. Zisman & Marguerite N. Woung, Superpowers of the FDIC/RTC and Their Availability to Third Parties,* 108 Banking L.J. 516 ("Zisman & Woung"), 521 (1991). Thus, the FDIC-C fulfilled its insurance obligation by wiring to HKSB the money required to pay the principal amounts of the insured deposits transferred to HKSB. Def. Rule 56.1 Statement at ¶ 38.

Bancorp points to no evidence that a DITAPA transaction is "the most expensive method of resolution, and the most damaging to the interests of the shareholders."[17] Am.

---

[17] In its Statement of Disputed Material Facts, Bancorp asserts that "the payout method is the most expensive method of a bank liquidation," and points us to the deposition of William R. Watson, the Director of the FDIC's Division of Research and Statistics. Pl. Rule 56.1 Statement at ¶ 11. However, Mr. Watson's deposition does not support this proposition. In the section to which the FDIC points, Mr. Watson states that the "loss rate," the percentage loss generally taken on liquidated assets, for "the typical small bank" was "something like 25 percent on assets." Watson Deposition, Pl. Memo. Exh. 7, at 62. Mr. Watson appears to have been speaking about loss rates for small banks generally, no matter what the liquidation method used. Bancorp points us to nothing that indicates that Mr. Watson was speaking specifically about losses incurred when the FDIC used a DITAPA transaction to fulfill its insurance obligation. Moreover, even if Mr. Watson's statement did stand for the proposition that the loss rate when DITAPA transactions were used was 25%,

[Footnote continued on next page]

Compl. at ¶ 88(h). Bancorp merely asserts that there are alternatives, including paying depositors directly, and a purchase and assumption transaction.[18] Pl. Memo. at 19.

However, the FDIC had discretion to choose the method it believed appropriate to fulfill its insurance obligation. The relevant statute allowed the FDIC to make payment "either (1) by cash or (2) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured depository institution in an amount equal to the insured deposit of such depositor." 12 U.S.C. § 1821(f) (1982). Again, we are conscious of the posture of the case, and we are directed to no evidence suggesting that the FDIC's actions were wrongful, let alone "deliberately wasteful and self-serving." *Golden Pac. Bancorp, Schwartz Opinion*, 1997 U.S. Dist. LEXIS 15537, at *6.

Thus, summary judgment on Bancorp's breach of fiduciary duty claim is granted to the FDIC.

C. Corporate Waste

Bancorp also advances a claim for corporate waste. Bancorp first alleges that the FDIC-C's allocation of FDIC expenses to receiverships it manages is "arbitrary and not founded on fair and equitable treatment of shareholders in cases where there is solvency in the estates, or reasonably foreseeable solvency." Am. Compl. at ¶ 91. Along these

---

[Footnote continued from previous page]
Bancorp points us to no evidence that that rate was higher than the resulting rate when other methods were used.

[18] In a purchase and assumption transaction, deposits are transferred to another institution, and that other institution actually assumes liability for the deposits, instead of simply becoming the paying agent. Zisman & Woung at 521.

lines, Bancorp specifically attacks the amounts spent on salaries, allocation of overhead, travel, and professional fees as constituting waste. *Id.* at ¶ 92. Second, Bancorp asserts that waste was committed by the inappropriate payment of post-insolvency interest. *Id.* Third, Bancorp argues the FDIC-R committed waste by improperly discontinuing a lawsuit against a former employee. *Id.* at ¶ 93. The FDIC asserts that there is no genuine issue of material fact as to these allegations. Def. Memo. at 19-21.

Under New York law, "the essence of waste is the diversion of corporate assets for improper or unnecessary purposes." *Aronoff v. Albanese*, 446 N.Y.S.2d 368, 370, 85 A.D.2d 3, 5 (N.Y. App. Div. 1982). We also note that receivers, just like corporate directors, are entitled to the deference of the business judgment rule in their decision-making concerning the management of a corporation, *Citibank, N.A. v. Nyland (CF8), Ltd.*, No. 86 Civ. 9181 (WK), 1990 U.S. Dist. LEXIS 12338, at *8 (S.D.N.Y. Sept. 19, 1990), and that when the FDIC administers a receivership it is also entitled to this deference. *Corbin v. Federal Reserve Bank*, 475 F. Supp. 1060, 1071 (S.D.N.Y. 1979).

We address seriatim Bancorp's allegations of waste.

(1) Post-Insolvency Interest

Because we have concluded that these payments were legal and appropriate, *see* Section II.A *supra*, we grant summary judgment to the FDIC on the issue of whether the payment of post-insolvency interest constituted waste.

(2) Allocation of Expenses

We deal next with the allocation of expenses during the receivership. Here the FDIC points to the absence of support for Bancorp's argument concerning expenses in the deposition testimony of two witnesses for Bancorp: Dr. Chuang and Dr. Warren Heller. *Id.* at 20-21. When Dr. Chuang was asked whether he had "an understanding as to the allocability

of expenses in an insolvent bank," he replied: "I have no any position. I am not in a position to comment on that issue, whether the FDIC have the right or FDIC have discretionary power or how the FDIC allocate the liquidation expenses." Def. Memo. Exh. 11, at 404. In further response to the same question, Dr. Chuang said, "That—I'm not authority to—I don't know." *Id.* Similarly, the deposition of Dr. Warren Heller, Bancorp's expert, was equally vague. Dr. Heller stated that he had no detailed knowledge of the FDIC's method for charging receivership expenses, and no knowledge of whether the FDIC's handling of expenses in the Golden Pacific receivership was any different from its handling of expenses in other receiverships. Def. Memo. Exh. 20, at 261-62.

The FDIC, by pointing to this testimony, or lack thereof, has made a preliminary showing that there is no genuine issue of material fact as to the permissibility of the allocated expenses. This shifts the burden to Bancorp to designate specific facts showing that there is such an issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Bancorp failed to do so in its brief. In its brief, Bancorp alleges that the FDIC charged "unnecessary and unauthorized expenses" to the receivership estate. Pl. Memo. at 12. However, to support those allegations, Bancorp cites mainly to the First Amended Complaint in this action.[19] *Id.* at 12-13. A

---

[19] Bancorp also cites to the FDIC's Statement of Undisputed Material Facts filed in December of 1999 in support of the FDIC's earlier motion for summary judgment in this case. That citation is in support of the following sentence in Bancorp's brief: "Some of these expenses were charged to the receivership estate after January 10, 1990, by which time all principal claims had been paid in full." Pl. Memo. at 13.

[Footnote continued on next page]

party cannot rely on the complaint to defeat a motion for summary judgment. *Champion v. Artuz*, 76 F.3d 483, 485 (2d Cir. 1996) (per curiam). Bancorp also points us to the declaration of Joseph Chuang, the former Chairman and President of Golden Pacific. However, with the exception of Dr. Chuang's statement that he is the former Chairman and President of Golden Pacific National Bank, there is nothing in his declaration that is based on personal knowledge or that points to other admissible evidence. Thus, Bancorp's answering papers to the FDIC's motion for summary judgment did not raise a genuine issue of material fact as to expenses.

However, the FDIC, simultaneously with the filing of its reply on its summary judgment motion, filed an additional motion, entitled a "Motion to Strike Affidavits." This motion argued what we concluded above, namely that the declaration of Dr. Chuang ("Chuang Decl.") failed to offer facts that would be admissible into evidence.[19]

[Footnote continued from previous page]
However, the section of the FDIC's Rule 56.1 Statement that is relied on does not support this proposition. It states only that interest stopped accruing on the receivership on January 10, 1990, but says nothing concerning whether expenses continued to accrue beyond that date. Defendant's Rule 56.1 Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, December 15, 1999, PP 65-66.

19 The FDIC also moved to have the affirmation of Thomas A. Brooks ("Brooks Affirm.") stricken. Brooks was general counsel to the FDIC from 1981 to 1984. The FDIC's motion concerning the Brooks Affirmation concerns only that portion of the affidavit that discusses the FDIC's handling of the solvency issue. Def. Affidavits Memo. at 4 n.4. Because we have concluded that the FDIC had no duty to determine the

[Footnote continued on next page]

In response to the FDIC's motion to strike affidavits, Bancorp submitted a Supplemental Declaration of Joseph Chuang ("Chuang Supp. Decl."). This declaration, like the original, is based on Dr. Chuang's attendance at and participation in depositions, and his review of discovery documents and the pleadings in the action.[20] Chuang Supp. Decl., ¶ 1. Thus, it is still not based on personal knowledge. However, it does point to specific pieces of evidence that are in the record, *see infra*, that would apparently be admissible at trial, and that could serve to create a genuine issue of material fact. *See Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001) ("Affidavits submitted to defeat summary judgment must be admissible themselves or must contain evidence that will be presented in an admissible form at trial.").

[Footnote continued from previous page]
solvency of the Bank before it acted to fulfill its insurance obligations, this portion of the Brooks Affirmation is no longer relevant, and the motion to strike the Brooks Affirmation is denied as moot.

[20] Dr. Chuang also claims in the supplemental declaration that it is based on his interaction with officials of the FDIC during the course of the receivership. Chuang Supp. Decl. at ¶ 1. Depending on what he were to allege, this could mean that his statements were based on personal knowledge. However, though the declaration in its first paragraph purports to be based in part on these interactions with FDIC officials while the events in question were taking place, a review of the specific factual allegations in it reveals that it is not. Instead, all of Dr. Chuang's statements are based on depositions, documents produced during discovery, or pleadings. Chuang Supp. Decl. at ¶¶ 2-16.

We note that were it not for the FDIC's Motion to Strike Affidavits, Bancorp would have had no occasion to submit a supplemental declaration. Though this entire procedure—both the motion to strike and the supplemental declaration—is unusual, nonetheless we believe we should be careful not to deny the party opposing summary judgment the chance for a full trial on an issue as to which reasonable triers of fact might disagree. *See Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (noting that summary judgment is "not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial," and ruling that transcript of trial testimony could defeat summary judgment despite possible defects in its certification and presentation); Wright, Miller & Kane, Federal Practice and Procedure § 2738, at 343 (3d ed. 1998) (noting that courts seem to "treat papers of the party opposing [a summary judgment] motion indulgently"). Accordingly, since the supplemental declaration refers to evidence in the record that is relevant to the claim of waste, we deny the FDIC's Motion to Strike Affidavits as to the Chuang declarations, and we proceed to consider that evidence.

a. Legal Fees Incurred in Yellow Certificates Lawsuit

One of the expenses that Bancorp believes amounts to waste is the payment of legal fees in a lawsuit the FDIC brought to determine the status of the yellow certificates. The FDIC brought a declaratory judgment action to determine whether the FDIC was liable for insurance on these securities. In his supplemental declaration, Dr. Chuang points to a letter from Gail Verley, a manager at the FDIC, indicating that the FDIC paid $595,677 in connection with this litigation. J.A. at 56. Having been directed to nothing that would dispute this or justify the expenditure, we decline to grant summary judgment to the FDIC on the issue of whether the payment of at least $595,677 in litigation expenses out of receivership funds constituted waste.

b. Post-Insolvency Interest on Yellow Certificates

Bancorp also asserts that the FDIC's payment of post-insolvency interest on the yellow certificates was excessive. The sole support for this contention is an internal FDIC memorandum indicating that the FDIC-C filed a claim against the FDIC-R for $1,043,086 for the payment of post-closing interest on the yellow certificates. Chuang Supp. Decl. at ¶ 5; Chuang Supp. Decl. Exh. 1. However, Bancorp has failed to offer any more specific information about this payment, such as the interest rate used to determine it, nor has Bancorp offered any reason why this amount might possibly be "excessive." This bald allegation does not suffice to create a genuine issue of material fact, and summary judgment is hence granted to the FDIC on this issue

c. $200,000 Credit to Dr. Chuang

Bancorp asserts as part of its waste claim that the FDIC "had to payoff . . . claims caused by its own misconduct." Pl. Memo. at 20. This assertion derives from the settlement agreement reached in 1988 between Dr. Chuang, Bancorp, and the FDIC to resolve claims in *FDIC v. Chuang*, No. 85 Civ. 7468 (SWK). In that agreement, Bancorp agreed to pay the FDIC $14,625,000 and to acquire certain assets of the receivership. *Id.*, 2, 26-33. In the same agreement, the FDIC agreed to give Dr. Chuang a $200,000 credit to settle his claim against the FDIC for closing down Dr. Chuang's law office, which was located in the Golden Pacific building. Chuang Supp. Decl. at ¶ 6; Chuang Supp. Decl. Exh. 2. Bancorp's argument must be placed in perspective: the net effect of the $200,000 credit is that the amount the FDIC received was reduced by 1.3%. This resolution of a burdensome litigation, which facilitated a large cash infusion to the receivership, and enabled the FDIC to further the process of liquidating the Bank's assets cannot meaningfully be described as wasteful. Moreover, as far as the actual handling

of Dr. Chuang's office is concerned, absent other evidence, it strikes us as reasonable to limit the access of the former Chairman and President of a failed bank to his offices in the Bank building while that bank was in a state of receivership. Thus, we conclude that the credit, especially when viewed as a tiny percentage of an overall favorable settlement, was within the reasonable business judgment of the FDIC. Summary judgment is granted to the FDIC on this issue.

d. Failure to Pursue a Claim

Bancorp asserts as part of its waste claim that the FDIC "failed to pursue some claims." Pl. Memo. at 20. The Chuang Supplemental Declaration is somewhat more specific, claiming the FDIC "admitted" in its Memorandum of Law in Support of its First Motion for Summary Judgment, dated December 15, 1999, that it did not pursue a suit for embezzlement and check-kiting against a former employee of the Bank. Chuang Supp. Decl. at ¶ 7. Again, we are pointed to no specific information concerning why this litigation was worth pursuing, and again, Bancorp has failed at this late stage of the case to raise a genuine issue of material fact as to whether the FDIC's decision was not reasonably within the FDIC's business judgment. Thus, the FDIC is granted summary judgment on this claim as well.

e. Alleged Failure to Collect Rent

Bancorp's next claim, that the FDIC "failed to collect rent," Pl. Memo. at 20, is similarly unsupported in Bancorp's brief. The Chuang Supplemental Declaration's effort to fill the void is unavailing. Although the declaration refers to the deposition of the FDIC's closing manager, George M. Herger, and claims Mr. Herger "admitted . . . that the Receiver did not charge FBI rent for use of the bank's premises, and that was wrong," Chuang Supp. Decl. at ¶ 9, Bancorp overstates Mr. Herger's actual testimony. Mr. Herger states that the FDIC giving the FBI space without charging rent "wouldn't be appropriate," but offers no evidence to support

Bancorp's claim that this is what happened. Deposition of George Herger, Chuang Supp. Decl. Exh. 3, at 102. In fact, Mr. Herger states specifically that he doesn't recall "being involved in any lease or renting of any space to the FBI." *Id.* Thus, summary judgment on this issue is granted to the FDIC.

f. Repurchase of Loan Assets from HKSB

In the supplemental declaration Bancorp also asserts that the FDIC-R unnecessarily repurchased from HKSB loan assets that HKSB had originally purchased from the FDIC-R as part of the DITAPA transaction. Chuang Supp. Decl. at ¶ 10. To support this allegation, Bancorp points to a letter from Robert M. Cittadino, an FDIC manager, to Mr. N.P. Snaith at HKSB, dated Feb. 18, 1986. *Id.*; Cittadino Letter, Chuang Supp. Decl. Exh. 4. In that letter, Mr. Cittadino responds to a request by HKSB that the FDIC repurchase assets totaling $826,355. Though the FDIC in the letter declines to repurchase the assets in question, the FDIC does recite a partial history of the loan repurchase transactions between the FDIC and HKSB. According to the letter, under the terms of the DITAPA transaction, which was entered into on June 26, 1985, HKSB had "sixty (60) days in which to notify the FDIC of any loans" it wished to have repurchased. Within the sixty-day period, HKSB had asked to have the FDIC repurchase all of the loans, but the FDIC had apparently only agreed to repurchase a portion of the loans at that time. However, the FDIC did make a second repurchase of assets on October 29, 1985. Although the letter does not specify the value of the assets involved in either the first or the second repurchase, which was outside the sixty-day limit, it does state that the total amount of loans repurchased in both transactions was "$7.3 million of the $11.8 million in loans your organization originally purchased as part of this transaction."

The FDIC has not responded either factually or legally to this aspect of the waste claim. Thus, the FDIC's application for summary judgment must be denied as to this issue.

However, as we have noted, Bancorp's initial papers in opposition to the FDIC's motion for summary judgment were insufficient to raise genuine issues on any claim of waste. Nonetheless, Bancorp took advantage of the FDIC's cross-motion to strike the affidavit of Dr. Chuang to supplement Dr. Chuang's affidavit. Based on the supplementation and limited response of the FDIC, we find that the FDIC has not met its burden as to certain issues on its motion for summary judgment. Under these circumstances, the FDIC is granted leave to renew its motion for summary judgment on any of the remaining issues. If the FDIC decides to renew its motion for summary judgment, it should inform us within two weeks of the issuance of this opinion and a prompt briefing schedule will be set.

To summarize our disposition of the waste claim, the FDIC is granted summary judgment on all aspects of Bancorp's claim for corporate waste, except for 1) Bancorp's argument concerning the allocation of the expenses in the yellow certificates lawsuit, and 2) Bancorp's argument concerning the repurchase of loan and/or other assets from HKSB.[21]

---

21 As we noted, the factual basis of Bancorp's claim of corporate waste is essentially the same as the factual basis of one aspect of Bancorp's unjust enrichment claim. *See* Section II.A *supra*. To the extent that Bancorp's claims of unjust enrichment and corporate waste overlap, we reach the same decision on each.

D. Accounting

The FDIC argues that it is entitled to summary judgment on Bancorp's claim for an accounting. We agree. Given our decision that the FDIC had no duty to re-evaluate the Bank's solvency before it fulfilled its insurance obligation, and given the significant discovery completed to date, an accounting is simply not appropriate.

There are two meanings of the term "accounting" that could conceivably be applicable here. One version of an accounting, also known as an accounting for profits, is a remedy designed to avoid unjust enrichment by forcing the defendant to pay restitution for its ill-gotten gains. *Dobbs, Law of Remedies,* § 4.3(5), at 608 (2d ed. 1993). An accounting for profits is an appropriate and highly useful remedy when a fiduciary has engaged in wrongdoing that has yielded "profits produced by property which in equity and good conscience belonged to the plaintiff," *id.*, and imposes on the defendant the burden of accounting for and disgorging all gains improperly attained. Dobbs, *supra*, § 4.3(5), at 610; *see Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 706 (S.D. Tex. 2002).

The alternative meaning of an "accounting" that Bancorp could be invoking is "in effect hardly more than a discovery order" a procedure that existed historically, "originating in equity at a time when discovery was not generally available otherwise." Dobbs, *supra*, § 4.3(5), at 610. Under this form of accounting, the defendant was compelled to produce books or other data once a prima facie case had been made out. *Id.*

It is not clear which type of accounting Bancorp seeks here. In its complaint, Bancorp cites what it deems are "questionable expenses and practices," and demands "an accounting of this receivership estate to determine the true measure of self-dealing and arbitrary financial arrangements arrived at between the FDIC-R and the FDIC-C." Am. Compl. at ¶ 95. Its brief on the issue states that "an account-

ing should be made by Bancorp's fiduciary." Pl. Memo. at 20. This language seems to indicate a request for an accounting for profits. However, the complaint also claims "that the FDIC's responses to date to critical issues is woefully lacking," Am. Compl. at ¶ 96, and Bancorp's brief notes the "complexity of the exorbitant expenses incurred or charged to the estate." Pl. Memo. at 20. This would seem to indicate that Bancorp desires an order for an accounting as a discovery tool. Because Bancorp has not specified which type of accounting it, seeks, we consider whether it is entitled to an accounting under either meaning.

To order an accounting for profits requires a conclusion that fundamentally the FDIC's management of the receivership was wrongful, *i.e.*, accepting Bancorp's argument concerning solvency: that the FDIC had a duty to re-examine the solvency of the receivership and to terminate the receivership if it concluded that the receivership's assets outweighed its liabilities. However, we have rejected Bancorp's argument concerning a duty to re-evaluate solvency. *See* Section II.A *supra*. Thus, there is no basis for ordering an accounting for profits.

The historical type of accounting as a discovery device does not appear to be used often in modern cases, perhaps because the need for such a tool has been obviated by the discovery procedures that have emerged.[22] *See* Dobbs, *supra*, § 4.3(5), at 610 ("In the light of extensive modern dis-

---

22 Indeed, use of an accounting in lieu of discovery is disfavored. *Arrowroot Natural Pharmacy v. Standard Homeopathic Co.*, Civ. No. 96-3934, 1998 U.S. Dist. LEXIS 1327, at *33 (E.D. Pa. Feb. 10, 1998) ("An accounting request is not a substitute for plaintiffs' obligation to establish their damages through discovery.").

covery, this kind of accounting [as a discovery tool] probably has little or no use today.").

In the case at bar, there is no reason to conclude that there has been a breakdown in the discovery process that would justify an accounting for discovery purposes. We assume that Bancorp has requested the documents it thought relevant and in the absence of a motion to compel we further assume that the FDIC has fulfilled its discovery obligations. Certainly, there is every indication that discovery has been exhaustive. The evidence submitted on this motion totals more than 6,000 pages, and includes excerpts from fifteen depositions, two affirmations, seven affidavits, three declarations, and one sworn statement, as well as two expert reports. More specifically, the record includes a report prepared by the FDIC's expert, Wayne S. Green, which is itself a detailed accounting of the finances of the receivership. In light of this, a demand for an accounting as a form of discovery, if that is what Bancorp seeks, is unnecessary.

For these reasons, summary judgment on Bancorp's claim for an accounting is granted to the FDIC.

III. Plaintiff's Jury Demand

The FDIC has moved to strike Bancorp's demand for a jury trial.

The right to a jury trial stems from the Seventh Amendment to the Constitution, which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. In doubtful cases, a court should favor the party seeking a jury trial. *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F. Supp. 1018, 1022 (S.D.N.Y. 1975).

According to the Supreme Court, "the phrase 'Suits at common law' refers to 'suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (quoting *Parsons v. Bedford*, 3 Pet. 433, 447, 28 U.S. 433 (1830)) (emphasis and alterations in original). Thus, our function is to determine whether each of Bancorp's remaining claims requires the determination of legal or equitable rights and remedies. In view of our decision in Part II, we only need to consider Bancorp's unjust enrichment and waste claims.

We deal first with the unjust enrichment claim. To decide whether Bancorp is entitled to a jury trial on this claim, we must decide whether it seeks damages, traditionally a legal remedy, *Chauffeurs, Teamsters & Helpers Local No. 391*, 494 U.S. at 570, or restitution, traditionally an equitable remedy. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). In a claim for damages, the plaintiff seeks money to compensate for loss or injury sustained by the plaintiff due to the defendant's wrongful action. Dobbs, *Law of Remedies*, § 4.1(1), at 551 (2d ed. 1993); Black's Law Dictionary (7th ed. 1999). In a claim for restitution, the plaintiff seeks the return or restoration of whatever the defendant gained due to the wrongful action. Dobbs, *supra*, § 4.1(1) at 551; Black's Law Dictionary.

It is clear that restitution is the traditional remedy employed for unjust enrichment claims. *Brown v. Sandimo Materials*, 250 F.3d 120, 126 (2d Cir. 2001); *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3d Cir. 1998); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 263 (2d Cir. 1984). *See also* Dobbs, *supra*, § 4.1(1), at 552 (noting that "purpose [of restitution claims] is to prevent the defendant's unjust enrichment by recapturing the gains the defendant se-

cured in a transaction"). Not surprisingly, courts have held that an unjust enrichment claim is an equitable claim that does not entitle a party to a jury trial. *SEC v. Commonwealth Chem. Secur., Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978); *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 123 F.Supp 2d 203, 206 (S.D.N.Y. 2000); *Merriam-Webster, Inc. v. Random House, Inc.*, 91 Civ. 1221 (LMM), 1993 U.S. Dist. LEXIS 7693, at *7 (S.D.N.Y. June 10, 1993).

Bancorp made a conscious decision to proceed in equity rather than in tort. This choice was apparently made, at least in part, to avoid the application of the exhaustion requirements of the Federal Tort Claims Act. In its brief to Judge Schwartz on the Federal Tort Claims Act issue, Bancorp asserted that its case was "not a tort action for money damages. Rather, Bancorp. . .has raised an equitable claim of unjust enrichment that seeks restitution from the FDIC." Plaintiff's Objections to the Report and Recommendation dated July 31, 1997. Similarly, the unjust enrichment section of the complaint uses the language of equity and calls for "disgorgement" of funds. Am. Compl. at ¶¶ 74-75, 78. Having made its choice to proceed in equity, and not in law, Bancorp must now live with that choice.

Bancorp cites only one case in support of its argument that unjust enrichment claims are primarily legal in nature, *Miller v. Doniger*, which states that "claims for unjust enrichment where an award of money would fairly compensate the party bringing the claim" are "legal in nature." 293 A.D.2d 282, 282 (N.Y. App. Div. 1st Dep't 2002). This quotation does not accurately reflect Supreme Court jurisprudence on this issue. The Supreme Court has steadfastly refused to adopt this position. In *Chauffeurs, Teamsters & Helpers Local No. 391*, the Court again noted that "this Court has not. . . held 'any award of monetary relief must *necessarily* be "legal" relief.' (emphasis added)." *Chauffeurs, Teamsters & Helpers Local No. 391*, 494 U.S. at 570 (1990)

(citation omitted) quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974)). Moreover, this argument has previously been rejected by Judge Martin of this court: plaintiffs "incorrectly presume that any award of monetary relief constitutes legal relief." *Resner v. Arc Mills, Inc.*, 95 Civ. 2924 (JSM), 1996 U.S. Dist. LEXIS 14362, at *3 (S.D.N.Y. Sept. 30, 1996). Judge Martin continued: "Monetary awards may be equitable if they are restitutionary, 'incidental to or intertwined with injunctive relief.'" *Id.* (quoting *Tull v. U.S.*, 481 U.S. 412, 424 (1987)).

Hence, we hold that Bancorp is not entitled to a jury trial on its unjust enrichment claim.

We turn now to Bancorp's assertion that it is entitled to a jury trial on its corporate waste claim. Once again, Bancorp is bound by its previous assertion, made to avoid a Federal Tort Claims Act bar to this lawsuit. In a letter to Magistrate Judge Henry Pitman, Bancorp stated, "Count III is an equitable claim for waste, not a claim for tort damages." Letter to Magistrate Judge Henry Pitman dated July 3, 1997, Memorandum of Law in Support of Motion to Strike Plaintiff's Jury Demand Exh. 2, at 3. Moreover, Bancorp's argument to Judge Pitman was well supported by case authority. Relevant precedent demonstrates that corporate waste claims are equitable in nature. *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 126 (2d Cir. 1994) ("An action in equity for waste would have lain against the Partnership."); *Kamen v. Kemper Financial Services, Inc.*, 908 F.2d 1338, 1350-51 (7th Cir. 1990); *In re Gerbereux's Will*, 148 Misc. 461, 266 N.Y.S. 134, 140 (Surr. Ct. 1933) (noting that if directors who are trustees under a will act for their own enrichment, "courts of equity will hold them liable for corporate waste").

Finally, we briefly mention the one case to which Bancorp points to support its argument that it is entitled to a jury trial on its corporate waste claim. *Ross v. Bernhard*, 396 U.S. 531 (1970), is simply not a holding for the proposition

for which Bancorp cites it. While the court noted in its description of the shareholders' derivative claims that certain payments by the corporation constituted "waste and spoliation," *id.* at 532, the Court's ultimate determination that the plaintiffs should not necessarily have been denied their right to a jury trial did not turn on the legal or equitable nature of a waste claim, but rather on the Court's view that the plaintiffs' claim as a whole was, "at least in part, a legal one." *Id.* at 542. Significantly, in explaining this conclusion, the Court did not mention the waste allegation, but instead noted that the complaint included "allegations of ordinary breach of contract and gross negligence." *Id.*

As we have concluded that Bancorp is not entitled to a jury trial on either or its remaining claims, the FDIC's motion to strike Bancorp's jury demand is granted.

CONCLUSION

Defendant's motion for summary judgment as to plaintiff's claims of breach of fiduciary duty and for an accounting is granted. Defendant's motion for summary judgment as to plaintiff's claims of unjust enrichment and corporate waste is granted except as to Bancorp's argument concerning the FDIC's allocation of expenses to the yellow certificates lawsuit and Bancorp's argument concerning the repurchase of loans from HKSB. Defendant's motion to strike plaintiff's jury demand is granted as to the claims remaining in the case. Defendant's motion to strike affidavits is denied.

IT IS SO ORDERED.

DATED: December 24, 2002

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

APPENDIX D

United States Court of Appeals

FOR THE SECOND CIRCUIT

Argued Aug. 7, 2001 Decided Dec. 7, 2001

Nos. 00-6208 L, 00-6258(CON)

GOLDEN PACIFIC BANCORP,

Plaintiff-Counter-Defendant-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Counter-Claimant-Appellee,

John G. Roberts, Jr., Hogan & Hartson L.L.P., Washington, D.C., (Loraine F. Hebert; Paul A. Batista, New York, NY, on the brief) for Plaintiff-Counter-Defendant-Appellant.

J. Scott Watson, Federal Deposit Insurance Corporation, Washington, D.C., (Ann S. DuRoss, Assistant General Counsel; Robert D. McGillicuddy, Supervisory Counsel; Alan L. Spear, Counsel, on the brief; Daniel J. Buzzetta, Thelen, Reid & Priest, LLP, New York, NY, on the brief) for Defendant-Counter-Claimant-Appellee.

Before: MINER, CALABRESI, and CABRANES, *Circuit Judges*.

JOSE A. CABRANES, *Circuit Judge.*

Plaintiff Golden Pacific Bancorp ("Bancorp" or "plaintiff") appeals from a judgment filed on June 16, 2000, by the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*), *Golden Pac. Bancorp ex rel. Golden Pac. Nat'l Bank v. FDIC*, No. 95 Civ. 9281, 2000 WL 776928, at *1 (S.D.N.Y. June 15, 2000), granting summary judgment to defendant Federal Deposit Insurance Corporation ("FDIC" or "defendant") on the grounds that plaintiff's claims brought in 1995 are barred by a release entered into between plaintiff and defendant, or alternatively, by New York's six-year statute of limitations for claims of unjust enrichment, breach of fiduciary duty, and corporate waste under N.Y. C.P.L.R. § 213(7). *Id.* at *4-6. On appeal, plaintiff asserts, *inter alia,* (1) that the release does not bar its claims because the language of the release does not cover them and (2) that the statute of limitations does not bar its claims because it runs from the termination of the receivership on November 1, 1995. For the reasons stated below, we vacate and remand the cause to the District Court for further proceedings consistent with this opinion.

I.

Bancorp owned more than 90% of the stock in Golden Pacific National Bank ("the Bank"), which was closed on June 21, 1985, by the Office of the Comptroller of the Currency ("the OCC") after the OCC had determined that the Bank was insolvent. The FDIC immediately placed the Bank into receivership and proceeded to pay the Bank's depositors. The FDIC also charged its legal and office expenses to the estate of the receivership. After it completed payment to the Bank's depositors, the FDIC paid itself post-insolvency interest to which it believed itself entitled, with its first payment on March 15, 1991. The FDIC ended the receivership on November 1, 1995.

Substantial litigation between the present parties followed in the wake of the OCC's decision to close the bank. In September 1985, soon after the Bank was closed, the FDIC brought a civil action ("the September 1985 action") against a number of the Bank's officers seeking to recover $14 million in "assets from [those] who allegedly owe[d] funds to the Bank either as borrowers or guarantors." *FDIC v. Chuang*, 690 F. Supp. 192, 193 (S.D.N.Y. 1988). The defendants in that action counterclaimed for breach of fiduciary duty, misappropriation of funds, and loss of business opportunities in connection with some of the FDIC's actions as receiver. The FDIC brought a second action in 1985, seeking a declaratory judgment regarding the status of certain of the Bank's liabilities, in which it ultimately prevailed.

In addition, beginning in 1985, Bancorp twice tried unsuccessfully to sue the OCC, contending that the OCC had erroneously determined that the Bank was insolvent at the time of its closure. In these two related, successive actions, Bancorp's claims were held meritless under the Administrative Procedure Act and the Federal Tort Claims Act, *Golden Pac. Bancorp v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988), and held not to constitute a taking under the Fifth Amendment, *Golden Pac. Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994).

Then, in May 1986, Bancorp's former president and chief executive officer, Joseph Chuang, brought an action ("the May 1986 action") against the FDIC, among others, claiming that it had appropriated his law offices in connection with the seizure of the bank. As part of the combined settlement of the May 1986 action and the September 1985

action, the parties agreed to exchange certain releases.[1] Bancorp—although not a party to either action—executed a release on June 6, 1988 ("the release"), stating in relevant part:

> [Bancorp] . . . hereby releases the [FDIC], in its corporate capacity and in its capacity as receiver of the [Bank] . . . (c) from any and all claims which Bancorp . . . has or may have arising from or with respect to the decision of the [OCC] to close the Bank on June 21, 1985.[2]

---

[1] In addition to the parties' exchange of releases, Bancorp agreed, *inter alia*, to pay the FDIC $14.6 million, while the FDIC agreed, *inter alia*, to transfer to Bancorp certain of the Bank's receivership assets.

[2] The full text of the release is as follows:

> [Bancorp] hereby releases the [FDIC], in its corporate capacity and in its capacity as receiver of the [Bank], and the [Bank]: (a) from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have relating to the assets and transactions which are the subject of the FDIC's claims set forth in its July 22, 1987 Amended Complaint in case no. 85 Civ. 7468 (S.D.N.Y.) (SWK); (b) from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have arising from the transactions which are the subject of any counterclaims which any defendant has asserted against the FDIC or the Bank in case no. 85 Civ. 7468 (S.D.N.Y.) (SWK); and (c) from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have arising from or with respect to the decision of the Comptrol-

[Footnote continued on next page]

Bancorp commenced the instant action in the Southern District of New York on October 31, 1995, one day before the FDIC terminated the receivership. It asserted four claims: (1) that the FDIC was liable for unjust enrichment for paying itself post-insolvency interest; (2) that the FDIC breached its fiduciary duty to Bancorp in its actions relating to the closure of the Bank, including its sale of certain Bank assets for an amount far below "true franchise value"; (3) that the FDIC wasted corporate assets of the Bank when it charged various legal and office expenses to the receivership estate for its own benefit; and (4) that the FDIC provided an inadequate accounting of the receivership estate. First Am. Compl., ¶¶ 72-99 (filed Mar. 4, 1996). In May 1996, the FDIC moved to dismiss the complaint for lack of subject matter jurisdiction, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2680(a), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The District Court (Allen G. Schwartz, *Judge*) denied defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, but referred to a magistrate judge the question of whether plaintiff's claims were time-barred.

On December 15, 1999, after the parties completed discovery, the FDIC filed a motion for summary judgment, arguing that Bancorp's action was barred by the release of June 6, 1988, and by the applicable statute of limitations. On June 16, 2000, the District Court (Naomi Reice Buchwald, *Judge*) concluded that plaintiff's claims were barred by the release or, in the alternative, by New York's six-year statute of limitations. *Golden Pac.*, 2000 WL 776928, at *4-6. Accordingly, it granted summary judgment for the FDIC.

[Footnote continued from previous page]

ler of the Currency to close the Bank on June 21, 1985.

Bancorp entered a notice of appeal of the District Court's judgment on June 29, 2000. On August 14, 2000, the Court granted Bancorp's summary judgment motion on the FDIC's previously unadjudicated counterclaim for attorney's fees to the FDIC. Then on September 1, 2000, Bancorp filed a second notice of its appeal from the June 16, 2000 judgment of the District Court.[3] On October 13, 2000, the FDIC filed its notice of cross-appeal from the August 14, 2000 order denying it attorney's fees. In an order filed December 19, 2000, we consolidated the appeals. On August 2, 2001, we granted the FDIC's motion to withdrew its cross-appeal for attorney's fees. Both parties' briefs assume that New York law controls.[4]

II.

A. STANDARD OF REVIEW

We review *de novo* a grant of summary judgment. *Catlin v. Sobol*, 93 F.3d 1112, 1116 (2d Cir. 1996). Summary judgment is inappropriate unless the court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

---

[3] Because the FDIC had contended that Bancorp's June 29, 2000 notice of appeal from the June 16, 2000 judgment was premature, Bancorp, "as a precautionary measure," filed a notice of appeal from the District Court's August 14, 2000 order on September 1, 2000.

[4] The parties' briefs assume that New York substantive law governs the issues of contract interpretation and statute of limitations presented here, and such implied consent is, of course, sufficient to establish the applicable choice of law. *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir. 2000).

FED. R. CIV. P. 56(c); *see also Catlin*, 93 F.3d at 1116. "The court must resolve all ambiguities and draw all inferences in favor of the non-moving party." *Id.*

A release is a species of contract and "is governed by principles of contract law." *Bank of Am. Nat'l Trust and Sav. Ass'n v. Gillaizeau*, 766 F.2d 709, 715 (2d Cir. 1985) (applying New York law). Whether a contract is ambiguous is a question for the court. *Van Wagner Adver. Corp. v. S&M Enters.*, 501 N.Y.S.2d 628, 631, 492 N.E.2d 756 (N.Y. 1986); *Fanger v. Manhattan Life Ins. Co.*, 273 A.D.2d 438, 709 N.Y.S.2d 622, 624 (2d Dep't 2000). The interpretation of an unambiguous contract—including a release—is also a question of law reserved for the court. *See VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 129 (2d Cir. 2001) (applying New York law). "Where contract language is ambiguous, the differing interpretations of the contract present a triable issue of fact." *Gillaizeau*, 766 F.2d at 715 (applying New York law).

The application of the statute of limitations is an issue of law and is reviewed *de novo*. *See Kidder, Peabody & Co. v. Henehan*, 267 A.D.2d 120, 699 N.Y.S.2d 689, 690 (1st Dep't 1999) (noting "New York's rule that threshold Statute of Limitations questions are for the courts"); *Kronisch v. United States*, 150 F.3d 112, 120 (2d Cir. 1998) (applying New York law).

B. THE RELEASE

Under New York law, a release—like any contract—must be construed in accordance with the intent of the parties who executed it. *Stone v. Nat'l Bank & Trust Co.*, 188 A.D.2d 865, 591 N.Y.S.2d 609, 611 (3d Dep't 1992); *see Gross v. Sweet*, 49 N.Y.2d 102, 108, 424 N.Y.S.2d 365, 400 N.E.2d 306 (N.Y. 1979) ("[A]n agreement [relieving] one party from the consequences of his negligence . . . must evince the 'unmistakable intent of the parties.'"). A release will not be given effect unless it contains an "explicit, un-

equivocal statement of a present promise to release [a party] from liability." *Gillaizeau*, 766 F.2d at 713 (internal quotation marks omitted). Moreover, because the "law looks with disfavor upon agreements intended to absolve [a party] from the consequences of his [wrongdoing]," a release which purports to excuse a party from responsibility for misconduct is subject to the "closest of judicial scrutiny." *Abramowitz v. N.Y. Univ. Dental Ctr., Coll. of Dentistry*, 110 A.D.2d 343, 494 N.Y.S.2d 721, 723 (2d Dep't 1985) (citing *Gross*, 49 N.Y.2d at 106). Applying the closest judicial scrutiny, we conclude that the District Court erred in granting summary judgment based on the release here.

Recall that the May 1988 release stated in relevant part:

> [Bancorp] . . . hereby releases the [FDIC], in its corporate capacity and in its capacity as receiver of the [Bank] . . . (c) from any and all claims which Bancorp . . . has or may have arising from or with respect to the decision of the [OCC] to close the Bank on June 21, 1985.

The District Court found that the release was unambiguous and covered all of plaintiff's claims:

> We find the language of the June 1988 release to be unambiguous, and to encompass plaintiff's claims that the FDIC improperly managed the Bank's receivership. The text's specific reference to "the [FDIC] . . . in its capacity as receiver of the [Bank]" clearly demonstrates the parties' intent to include the FDIC's handling of the receivership within the scope of the release. The claims at issue here, *i.e.*, the HKSB asset transfer, payment of FDIC office expenses and legal fees from the receivership estate, and payment of post-insolvency interest to creditors, are unambiguously claims that Bancorp "[h]ad or may

> have [had]" against FDIC-R as of June 1988 when the former released the lat[t]er. Bancorp's present attempt to argue that it had not intended to release defendant from the claims it now asserts simply cannot be reconciled with the unambiguous text of the release.

Golden Pac., 2000 WL 776928, at *4 (alterations in original) (footnotes omitted).

We do not find the contractual language to be as clear as the District Court did. We recently recalled that "the language of a contract is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138-39 (2d Cir. 2000) (internal quotation marks omitted) (applying New York law). Here, one could reasonably interpret the contract differently than the District Court did. The natural meaning of the contract was an agreement to release the FDIC from claims based on the OCC's decision to close the bank, not on claims of independent wrongdoing thereafter. The release specifies claims "arising from or with respect to *the decision of the* [*OCC*] *to close the Bank*." (emphasis supplied). It is far from clear whether claims of wrongdoing by the FDIC in its management of the receivership of the bank "aris[e] from or with respect to the decision . . . to close the Bank."

To be sure, the District Court held that because the receivership "was the direct result of the OCC's decision, [and] can be said to have arisen therefrom," the release includes claims based on the FDIC's mismanagement of the receivership. *Golden Pac.*, 2000 WL 776928, at *4 n.6. But, in our view of the matter, the District Court's interpretation stretches the language "arising from" beyond its normal limits. Bancorp agreed to release claims "arising from . . . the decision of the [OCC] to *close the Bank*," (emphasis sup-

plied), not from each and every event that followed thereafter. If one were to adopt the District Court's interpretation, then any act, no matter how far down the chain of causation and remotely related to the decision of the OCC to close the Bank, would fall within the scope of the release. This sort of causal reasoning would be analogous to finding that a patient, who signed a release with similar language to that in the instant case, had relinquished all claims relating to a second negligent operation performed to correct the negligence of the first operation, since the second operation "was the direct result of . . . [and] can be said to have arisen" from the first. It is hard to believe that the parties intended the release to be so broad. Nor is it clear from the rest of the language of the release that their intention was so far-reaching. Had the parties intended the release to include claims based on the FDIC's management of the receivership, it would have been simple enough for them to adopt language that made clear their understanding.

We are not persuaded by the District Court's stance that "the text's specific reference to the [FDIC] . . . in its capacity as receiver of the [Bank] clearly demonstrates the parties' intent to include the FDIC's handling of the receivership within the scope of the release." *Golden Pac.*, 2000 WL 776928, at *4 (second alteration in original) (internal quotation marks omitted). Even though the release refers to the FDIC's capacity as receiver, the release notably makes no mention of the FDIC's management of the receivership. One could reasonably conclude that the release mentioned the FDIC in its capacity as receiver not to foreclose all possible claims by Bancorp against the FDIC as receiver, but rather because that was the capacity in which the FDIC brought suit in the September 1985 action and was sued in the May 1986 action. Indeed, the release specifically refers to the claims and counterclaims in the September 1985 action. In any case, the contract wording requires us to conclude that the

release did not unambiguously relinquish Bancorp's claims against the FDIC for its alleged mismanagement of the Bank.

Where an agreement is ambiguous, a court may resort to extrinsic evidence to determine the parties' intent. *Stage Club Corp. v. W. Realty Co.*, 622 N.Y.S.2d 948, 950-51 (1st Dep't 1995). The parol evidence rule will not bar admission of evidence that clarifies the ambiguity, so long as the evidence is not inconsistent with the express terms of the contract. *Id.* There is ample extrinsic evidence in the instant case supporting Bancorp's argument that it did not intend to release the FDIC from all claims of wrongdoing relating to the receivership. Bancorp presented affidavits from two witnesses to the negotiation and execution of the release (Joseph Chuang, who signed the release, and Thomas A. Brooks, then-counsel to Bancorp). Chuang testified in his affidavit that when he executed the release he "had no intention . . . of releasing the FDIC from any claims stemming from its role" in managing the receivership. (Chuang Aff. ¶ 46). Moreover, Brooks attested to Bancorp's rejection of an earlier draft release proposed by the FDIC. (Brooks Aff. ¶¶ 7-8.) That draft release was far broader in scope than the release ultimately executed. It provided in relevant part:

> [Bancorp] hereby releases the [FDIC] . . . from any and all disputes and claims with and against the FDIC and/or the Bank which Bancorp and/or any of Bancorp's successors or assigns now has, ever had, or which may hereafter accrue, based on acts, omissions or transactions occurring prior to . . . 1988. Without limiting the foregoing . . . Bancorp releases the FDIC and the Bank from any dispute or claim arising from or in respect of the closing of the Bank or *any act taken by, or omission of, the FDIC as receiver of the Bank.*

(emphasis supplied). That language—expressly rejected by Bancorp—would have barred Bancorp's claims here, which indeed arise from "act[s] taken by . . . the FDIC as receiver of the Bank." That Bancorp rejected draft contract language which explicitly released the FDIC from any act taken or omitted as receiver of the Bank strongly suggests that Bancorp did not intend to relinquish such claims in the final release.

The District Court, in an alternative holding, concluded that, even if the release were to be considered ambiguous, necessitating an examination of extrinsic evidence, Bancorp's proffered parol evidence would not have altered its decision that the release barred Bancorp's claims. *Golden Pac.*, 2000 WL 776928, at *4 n.7. First, the District Court discounted Brooks' statement made in 1988 that "Bancorp should not execute a release as it was not a party to the [September 1985 action] brought by FDIC." *Id.* The District Court found that this statement alone was "unavailing" because, in any event, "Bancorp ultimately executed the release." *Id.* Second, the District Court gave no weight to Brooks' statement that "he had rejected an earlier draft of the release." *Id.* It concluded, "[h]aving reviewed both versions[,] . . . that the earlier version differs from the one ultimately signed, but [it was] unable to infer from the change that the parties intended to exclude plaintiff's claims against the receiver from the release's ambit." *Id.*

We disagree with the District Court's conclusions. To be sure, Brooks' statement that he had advised Bancorp not to execute *any* release does not help one interpret the scope of the release actually executed. Still, the District Court did not give due weight to the Chuang Affidavit, which bears directly on Bancorp's intention in signing the release. Nor did it give adequate consideration to Brooks' statement describing rejection of the first draft release. Moreover, the Court failed to give sufficient weight to the presence in the

first draft release of a provision expressly releasing the FDIC from any act or omission taken as receiver and the absence of any such clause in the final, executed release. Taken together, the evidence from Chuang's Affidavit, Brooks' statement describing the rejection of the first draft release, and the first draft release itself, raises a genuine issue of material fact as to the parties' intentions in executing the final release. Accordingly, the release should not have been the basis for summary judgment in favor of the FDIC. *See Mangini v. McClurg*, 24 N.Y.2d 556, 568, 249 N.E.2d 386 (N.Y. 1969) (holding that summary judgment based on release should not have been granted because "the affidavits and pretrial testimony presented on this motion for summary judgment fail to demonstrate conclusively that no issue of fact remains as to the intent of the parties"); *Scott v. Niagara Scuba Sports, Inc.*, 547 N.Y.S.2d 475, 476 (4th Dep't 1989) (holding that the "Supreme Court erred in granting defendants' summary judgment motion and dismissing plaintiff's claims" where "[t]he release that decedent signed . . . and upon which [the] Supreme Court relied is ambiguous and does not express in unmistakable language the intention of the parties"); *see also* FED. R. CIV. P. 56(c).

C. THE STATUTE OF LIMITATIONS

The statute of limitations in New York for claims of unjust enrichment, breach of fiduciary duty, corporate waste, and for an accounting is generally six years. *See* N.Y. C.P.L.R. §§ 213(1), (7) (McKinney 1990)[5]; *see also Loen-*

---

[5] N.Y. C.P.L.R. § 213 (McKinney 1990) provides in relevant part:

> The following actions must be commenced within six years:

[Footnote continued on next page]

gard v. Santa Fe Indus., Inc., 519 N.Y.S.2d 801, 803, 514 N.E.2d 113 (N.Y. 1987) (unjust enrichment as a result of breach of fiduciary obligation); *Niagara Mohawk Power Corp. v. Freed*, 265 A.D.2d 938, 696 N.Y.S.2d 600, 603 (4th Dep't 1999) (unjust enrichment and breach of fiduciary duty); *Blake v. Blake*, 638 N.Y.S.2d 632, 632 (1st Dep't 1996) (corporate waste and breach of fiduciary duty); *In re Barabash's Estate*, 31 N.Y.2d 76, 80, 286 N.E.2d 268 (N.Y. 1972) (accounting).

The FDIC argues that the statute of limitations runs upon the occurrence of the events underlying the plaintiff's cause of action. In the instant case, the FDIC maintains that the events underlying the plaintiff's claims arose in June 1985, when the FDIC began to liquidate the Bank. Accordingly, the FDIC concludes that the plaintiff's claims should be time-barred because it filed its lawsuit more than six years after June 1985.

Under New York law, the limitations period for claims arising out of a fiduciary relationship does not commence

---

[Footnote continued from previous page]

> 1. an action for which no limitation is specifically prescribed by law;
>
> . . .
>
> 7. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for *waste* or for an *injury to property* or for an *accounting* in conjunction therewith.

(emphases supplied).

"until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated." *Westchester Religious Inst. v. Kamerman*, 691 N.Y.S.2d 502, 503 (1st Dep't 1999); *accord 196 Owners Corp. v. Hampton Mgmt. Co.*, 642 N.Y.S.2d 316, 316 (1st Dep't 1996); *Bd. of Educ. v. Thompson Constr. Corp.*, 488 N.Y.S.2d 880, 882 (3 Dep't 1985). In such cases, the "statutory period [is] tolled between the alleged fiduciary misconduct" and the date on which the fiduciary relationship is openly repudiated or otherwise ended, so that any misconduct alleged before that end date "falls within the permissible temporal scope." *Kamerman*, 691 N.Y.S.2d at 503. A receivership is, of course, a type of fiduciary relationship and is therefore subject to this tolling period. *See, e.g., Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1080 (2d Cir. 1972) (Friendly, J.) (applying New York law) ("[A] receiver is a trustee with the highest kind of fiduciary obligations . . . to all persons interested in the receivership estate.") (internal quotation marks omitted).

The reason for such a tolling rule is that the beneficiary should be entitled to rely upon a fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit. *See Greene v. Greene*, 56 N.Y.2d 86, 92, 94-95, (N.Y. 1982) (describing the relationship between an attorney and his client as a fiduciary one and then noting that "the client [cannot] be expected . . . to oversee or supervise the attorney's handling of the matter, and thus . . . the client's right of action [did not] accrue[] before he terminated [his] relationship with [his] attorney"); *see also Barrella v. Richmond Mem'l Hosp.*, 453 N.Y.S.2d 444, 447 (2d Dep't 1982).

In this case, it is undisputed that Bancorp and the FDIC had a fiduciary relationship,[6] and that the FDIC did not terminate its fiduciary relationship with Bancorp—that is, its receivership of the Bank—until November 1, 1995. Accordingly, the statute of limitations on Bancorp's claims did not begin to run until that date. *See Kamerman*, 691 N.Y.S.2d at 503 (holding that a nonprofit corporation's officers could not be said to have openly repudiated their fiduciary obligations prior to leaving their positions of trust). Bancorp's lawsuit—filed on October 31, 1995—is thus timely under the six-year statute of limitations that began on November 1, 1995, when the fiduciary relationship ended.

Bancorp's unjust enrichment claim is timely for an additional reason. Under New York law, for a plaintiff to prevail on a claim of unjust enrichment, he must establish (1) that the defendant was enriched; (2) that the enrichment was at the plaintiff's expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff. *Universal City Studios, Inc. v. Nintendo Co.*, 797 F.2d 70, 79 (2d Cir. 1986) (applying New York law); *see State v. Barclays Bank*, 561 N.Y.S.2d 697, 701, 563 N.E.2d 11 (N.Y. 1990). The statute of limitations for unjust enrichment generally begins to run when the cause of action accrues. N.Y. C.P.L.R. § 203(a); *Plitman v. Leibowitz*, 990 F. Supp. 336, 337 (S.D.N.Y. 1998) ("Under New York law, an unjust enrichment claim accrues upon occurrence of the wrongful act giving rise to the duty of restitution."). The District Court held that the cause of action accrued on Bancorp's claims when the FDIC "began to perform the acts upon which the claims are based," *Golden Pac.*

---

6 Bancorp argues that they had a fiduciary relationship, and the FDIC does not deny that assertion.

2000 WL 776928, at *5; that is, the Court calculated the starting date for the six-year statute of limitations to be in or about 1985, when the FDIC began to accrue post-insolvency interest, and concluded that Bancorp had filed its claims too late.

The District Court improperly conflated the accrual of the cause of action with the accrual of post-insolvency interest. The statute of limitations for a claim of unjust enrichment begins to run "upon the occurrence of the wrongful act giving rise to a duty of restitution." *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 596 N.Y.S.2d 435, 437 (2d Dep't 1993). The wrongful act giving rise to restitution here was the FDIC's *payment of interest* to itself. The mere *accrual of interest, in the instant case,* does not unjustly enrich the FDIC nor does it *accrue the cause of action.* Rather, the accrual of interest simply designates a starting point for calculation. The cause of action did not accrue or become more than speculative until the FDIC began to pay itself interest on March 15, 1991. Indeed, before that point, the FDIC had neither been enriched nor possessed any of Bancorp's "money or property" that "equity and good conscience" would require it to return. Accordingly, Bancorp's claim for unjust enrichment brought before March 15, 1997 was timely.

III.

To summarize:

1. It is unclear whether the release covers plaintiff's claims against the FDIC for unjust enrichment, breach of fiduciary duty, waste of corporate assets, and an accounting in the management of the receivership. The extrinsic evidence, when viewed in the light most favorable to the plaintiff, is ambiguous and creates a genuine issue of material fact as to whether Bancorp intended to release the FDIC.

2. The statute of limitations does not bar Bancorp's claims as a matter of law because the limitation period did not begin to run until the receivership terminated.

For the reasons stated above, we vacate the June 16, 2000 judgment of the District Court and remand the cause to the Court for further proceedings consistent with this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GOLDEN PACIFIC BANCORP, FOR ITS OWN ACCOUNT AND DERIVATIVELY ON BEHALF OF AND IN THE NAME OF GOLDEN PACIFIC NATIONAL BANK

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CORPORATE CAPACITY AND IN ITS CAPACITY AS RECEIVER FOR GOLDEN PACIFIC BANK,

Defendant.

95 Civ. 9281 (NRB)

June 15, 2000

OPINION

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Golden Pacific Bancorp ("Bancorp"), for itself and derivatively on behalf of Golden Pacific National Bank ("Bank"), filed this action against defendant Federal Deposit Insurance Corporation ("FDIC") in both its corporate capacity and in its capacity as receiver of the Bank ("FDIC-C" and "FDIC-R," respectively), asserting causes of action for (1) unjust enrichment, (2) breach of fiduciary duty, (3) corporate waste, and (4) an accounting, in connection with the defendant's management of the Bank's receivership and liquidation commencing on June 21, 1985. Now pending is defen-

dant's motion, pursuant to Fed. R. Civ. P. 56, for summary judgment on the grounds that plaintiff's claims are barred (1) by a 1988 release that plaintiff executed and (2) by the applicable statute of limitations. For the reasons set forth below, defendant's motion is granted.

BACKGROUND

Bancorp's Claims[1]

On June 21, 1985, following a surprise investigation, the Office of the Comptroller of the Currency ("OCC") determined that the Bank was insolvent and appointed the FDIC as receiver to liquidate the Bank's assets.[2] Plaintiff, which

---

[1] Unless otherwise noted, the facts stated herein are drawn from the parties' submissions in connection with this motion, including their statements of undisputed facts, *see* Def.'s Rule 56.1 Statement of Undisputed Material Facts in Support ("Def.'s 56.1 Stmnt"); Pl.'s Counter-Statement Pursuant to Local Civil Rule 56.1 in Opposition ("Pl.'s 56.1 Stmnt"), witness affirmations, *see* Affirmation of Dr. Joseph Chuang, dated February 16, 2000, ("Chuang Aff."); Affirmation of Theresa Shieh, dated February 16, 2000, ("Shieh Aff."); Affirmation of Thomas A. Brooks, dated February 16, 2000, ("Brooks Aff."); Affirmation of Miles P. Jennings, Jr., ("Jennings Aff."); Affidavit of Evan S. Widlitz, dated December 14, 1999, ("Widlitz Aff."), and pleadings, *see* Widlitz Aff. Ex. 2 (plaintiff's Amended Complaint) & Ex. 6 (defendant's Answer and Counterclaims).

[2] On June 17, 1985, the OCC, the Bank's chartering authority and the agency responsible for monitoring the Bank's solvency, along with the FDIC-C, as an insurer of financial institutions, began to investigate the Bank's accounting of certain "yellow certificates," negotiable high interest certifi-

[Footnote continued on next page]

owned over 90 percent of the Bank's stock, claims that the OCC's finding of insolvency was improper; that the FDIC-C assisted the OCC in making its finding and thereby improperly forced the Bank into receivership; and, most pertinently, that the FDIC-R mismanaged the receivership. The gravamen of plaintiff's complaint concerns the receiver's winding up of the Bank's assets. *See* Chuang Aff. ¶¶ 5-6. Bancorp claims that the FDIC-R wasted the assets, incurring unauthorized and unnecessary expenses for its own benefit and to plaintiff's detriment.[3]

[Footnote continued from previous page]
cates named for the color or their paper. Based on its own accounting, namely the addition of a $15 million liability for the yellow certificates, the OCC found the Bank to have a negative net worth of $6 million and subsequently appointed the FDIC as receiver. *See* Def.'s 56.1 Stmnt ¶¶ 16-21; Widlitz Aff. Ex. 10.

[3]In an earlier ruling in this action, Judge Schwartz described the scope of plaintiff's claims thus:

> that only days after the closure of the Bank, the FDIC disclosed that the bank had a surplus of $9 million, that despite having discovered that the Bank was not insolvent, the FDIC nonetheless transferred its assets to [HKSB, *see infra*,], that the payment which the FDIC accepted from HKSB was far short of the true franchise value, and that the FDIC's claimed liquidation expenses were excessive, self-serving, and wasteful.

Golden Pacific Bancorp v. Federal Deposit Insurance Corp., 1997 WL 626374, at *2 (S.D.N.Y. Oct. 7, 1997) (hereinafter "*Bancorp I*") (internal citations omitted) (rejecting Magistrate Judge's recommendation that complaint be dismissed

[Footnote continued on next page]

Specifically, Bancorp points to: (1) the FDIC-R's sale of the Bank's assets to the Hong Kong and Shanghai Banking Corporation ("HKSB") on June 26, 1985 for the sum of $6,000,000; (2) defendant's payment of legal fees, in the amount of $600,000, in connection with its prosecution of a related civil action, from out of the receivership estate; (3) its expenditure of roughly $200,000 in office expenses, again paid out of the receivership estate; and, significantly, (4) defendant's allegedly unlawful payment of nearly $26,000,000 in post-insolvency interest to the Bank's creditors[4] throughout the course of the receivership and ending in May 1994. Plaintiff claims that the HKSB asset transfer was for an amount far below the true franchise value of the Bank's net assets; that the office expenses and legal fees were incurred for the FDIC's own benefit and should not have been paid out of the receivership estate; and that the payment of post-insolvency interest was not authorized by any applicable banking law.

By Bancorp's calculations, the Bank was solvent at the time of its closing by the OCC and had net assets in the amount of $16,000,000. Nevertheless, due to the defendant's alleged mismanagement, the FDIC incurred roughly

---

[Footnote continued from previous page]
for lack of subject matter jurisdiction pursuant to the Federal Tort Claims Act ("FTCA") and Adminstrative Procedures Act ("APA"), to the extent that plaintiff's allegations fall outside the scope of the FTCA's discretionary action exception, *see* 28 U.S.C. § 2680(a)).

[4] Most of this amount, approximately $23,000,000, was paid to the FDIC-C, the Bank's largest creditor by subrogation, that is, by virtue of its role as insurer of the Bank's deposits. *See* Def.'s 56.1 Stmnt ¶ 68.

$28,000,000 (including $24,000,000 in interest to the FDIC-C) in allegedly unnecessary expenses, and thereby left nothing to the Bank's shareholders. *See* Am. Compl. ¶ 9.

Procedural Posture

Substantial litigation, involving the present parties, followed in the wake of the Bank's closing and subsequent receivership. First, the FDIC-R brought a civil action in this District in September 1985 to recover over $14 million in funds allegedly diverted from the Bank, by Bancorp's principals among others. *See* Widlitz Aff. Ex. 7 (pleadings in *Federal Deposit Ins. Corp. v. Chuang, et al.*, No. 85 Civ. 7468 (SWK) (S.D.N.Y. filed Sept. 20, 1985) ("the September 1985 action")). The defendants in that action counterclaimed for breach of fiduciary duty, misappropriation of funds, and loss of business opportunities, in connection with some of the FDIC-R's actions as receiver. The FDIC-R brought a second action in this District in 1985, seeking a declaratory judgment as to the status of certain liabilities of the Bank, and ultimately prevailed. *See* Widlitz Aff. Ex. 10 (pleadings, Memorandum and Judgment in *FDIC v. Holders of Yellow Certificates No. 1 through 367*, 85 Civ. 8164 (S.D.N.Y. Mar. 4, 1987) ("the declaratory judgment action")).

In addition, starting in 1985, Bancorp unsuccessfully attempted to sue the OCC for its alleged erroneous determination that the Bank had been insolvent at the time of its closure. In two related, successive actions, plaintiff's claims were found by respective Courts of Appeals to be barred in one instance, *see Golden Pacific Bancorp v. Clarke*, 1986 WL 13881 (D.D.C. Aug. 1, 1986), *aff'd*, 837 F.2d 509 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988), and meritless in the other, *see Golden Pacific Bancorp v. United States*, 25 Cl.

Ct. 768 (1992), *aff'd*, 15 F.3d 1066 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 961 (1994).[5]

In 1988 Bancorp and the FDIC, the parties to this action, settled their respective claims against each other in the September 1985 action. Among other things, Bancorp agreed to pay the FDIC $14.6 million; the FDIC-R agreed to transfer to Bancorp certain of the Bank's receivership assets; and Bancorp released the FDIC.

Executed on Bancorp's behalf on June 6, 1988, *see* Chuang Aff. ¶ 44, the release ("June 1988 Release") reads, in full, as follows:

> [Bancorp] hereby releases the [FDIC], in its corporate capacity and in its capacity as receiver of the [Bank], and the [Bank]:
>
> (a) from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have relating to the assets and transac-

---

[5] In 1987 there even followed a criminal prosecution of the Bank's principal officers, Kuang Hsuang Chuang ("Chuang") and Theresa Shieh ("Shieh"), by the United States Attorney's Office for the Southern District of New York. In 1989, the defendants were found guilty, upon a jury verdict, of multiple counts of misapplication of bank funds, making false statements to bank regulatory officials, and conspiracy, during the OCC's investigation of the Bank in the days preceding the Bank's closing. Chuang was sentenced to five years in prison. *See United States v. Chuang*, 696 F. Supp. 910 (S.D.N.Y. 1988), *aff'd*, 897 F.2d 646 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990), *motion to vacate denied*, 1992 WL 212697 (S.D.N.Y. Aug. 26, 1992), *aff'd*, 992 F.2d 321 (2d Cir. 1993)

> tions which are the subject of the FDIC's claims set forth in its July 22, 1987 Amended Complaint in case no. 85 Civ. 7468 (S.D.N.Y.) (SWK);
>
> (b) from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have arising from the transactions which are the subject of any counterclaims which any defendant has asserted against the FDIC or the Bank in case no. 85 Civ. 7468 (S.D.N.Y.) (SWK); and
>
> (c) *from any and all claims which Bancorp (and/or any of its successors or assigns) has or may have arising from or with respect to the decision of the Comptroller of the Currency to close the Bank on June 21, 1985.*

Brooks Aff. Ex. 1 (emphasis added).

Despite its apparent release of the FDIC, plaintiff commenced the present action on October 31, 1995, claiming that its causes of action relate only to the receivership, not to the OCC's decision *per se*. *See* Chuang Aff. ¶¶ 5-6. In May 1996, the FDIC moved to dismiss the complaint for lack of subject matter jurisdiction, pursuant to the FTCA and APA. Rejecting the Magistrate Judge's recommended dismissal, Judge Schwartz denied the motion but significantly narrowed the scope of the action. Specifically, he ruled: (1) that the FDIC's conduct is actionable only to the extent that its liquidation of the Bank had been "deliberately wasteful and self-serving" and thereby not exempt from judicial review under the APA; (2) that at trial, Bancorp would be collaterally estopped from asserting that the Bank had been solvent at the time of its closure; and (3) that the action might be time-barred, subject to further briefing, depending on evidence of when plaintiff's causes of action accrued. *See Bancorp I*, 1997 WL 626374, at *2-4; Widlitz Aff. Ex. 3 (Report and

Recommendation of Magistrate Judge Henry Pitman, dated July 31, 1997, (the "Report")).

Accordingly, on December 15, 1999, after the parties exchanged discovery, defendant made the present motion for summary judgment, claiming the action barred by the June 1998 release and on timeliness grounds.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.'" *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and . . . draw all reasonable inferences in [her] favor." *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. In order to defeat such a motion, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248 (internal quotation omitted).

B. June 1988 Release

In bringing its motion, defendant asserts that plaintiff's claims are barred by the June 1988 release which states, in relevant part:

> [Bancorp] hereby releases the [FDIC] . . . in its capacity as receiver of the [Bank] . . . (c) from any and all claims which Bancorp. . . has or may have arising from or with respect to the decision of the [OCC] to close the Bank on June 21, 1985.

Brooks Aff. Ex. 1. Plaintiff, on the other hand, maintains that it never intended to release the FDIC-R for its role in the management of the receivership and that its present claims are not within the scope of the release. Chuang Aff. ¶ 46; Brooks Aff. ¶¶ 7-8. As further discussed below, we find that the release encompasses plaintiff's present claims and therefore find them barred.

In New York, a release is a species of contract, and its construction is governed by general principals of contract law. *Arias v. Mutual Central Alarm Services, Inc.*, 182 F.R.D. 407, 418 & n.69 (S.D.N.Y. 1998) (citing *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986)). Like any contract, a release must be construed in accordance with the intent of the parties, as manifested by the language employed, and without resort to extrinsic evidence where that language is unambiguous. *See K & S Co. v. Sexton Investment Co., L.P.*, 1999 WL 92284, at *5-6 (S.D.N.Y. Feb. 18, 1999) (citing *Middle East Banking Co. v. State Street Bank Int'l*, 821 F.2d 897, 907 (2d Cir. 1987)). Whether the language of a contract is ambiguous is a question of law, *Albany Savings Bank, FSB v. Halpin*, 117 F.3d 669 (2d Cir. 1997), and therefore, properly decided on a motion for summary judgment.

We find the language of the June 1988 release to be unambiguous, and to encompass plaintiff's claims that the FDIC improperly managed the Bank's receivership. The text's specific reference to "the [FDIC] . . . in its capacity as receiver of the [Bank]" clearly demonstrates the parties' intent to include the FDIC's handling of the receivership within the scope of the release.[6] The claims at issue here, *i.e.*, the HKSB asset transfer, payment of FDIC office expenses and legal fees from the receivership estate, and payment of post-insolvency interest to creditors, are unambiguously claims that Bancorp "had or may have [had]" against FDIC-R as of June 1988 when the former released the later. Bancorp's present attempt to argue that it had not intended to release defendant from the claims it now asserts simply cannot be reconciled with the unambiguous text of the release.[7]

---

[6] Plaintiff argues, at least indirectly, that the parties intended to exclude claims arising out of the receivership, as manifested by the release's specific mention of "the decision of the [OCC] to close the Bank on June 21, 1995," without any mention of the receivership itself. *See* Pl.'s Mem. at 13-14. We reject the argument, however. The receivership at issue here, which commenced on June 26, 1985, only days after the closure, was the direct result of the OCC's decision, can be said to have arisen therefrom, and is clearly incorporated into the release by express reference to "the [FDIC] . . . in its capacity as receiver."

[7] Nor would Bancorp's proffered parol evidence, *see* Brooks Aff. ¶¶ 6-8 & Ex. 3 at 8, were we to weigh it in our decision, persuade us otherwise. First, Bancorp asks us to consider the contemporaneous, written statement of its counsel in 1988 that "Bancorp should not execute a release as it was not a party to the [September 1985 action] brought by

[Footnote continued on next page]

Accordingly, plaintiff's claims are barred by the June 1988 release, which is unambiguous and covers these claims.

C. Statute of Limitations

As an alternative ground for its summary judgment motion, defendant asserts that plaintiff's claims are time-barred. The statute of limitations in New York for claims of unjust enrichment, breach of fiduciary duty, and corporate waste is generally six (6) years, *see* N.Y.C.P.L.R. § 213(7), and the period begins to run when the cause of action accrues. *See Plitman v. Leibowitz*, 990 F. Supp. 336, 337 (S.D.N.Y. 1998); *Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 741 (S.D.N.Y. 1997).[8] Thus, in order for Bancorp's claims to have been timely, they would had to have accrued no earlier than October 31, 1989, or in the case of the fiduciary duty claim, no earlier than February 21, 1990. They accrued much earlier and are therefore untimely.

[Footnote continued from previous page]
FDIC." *Id.* Ex. 3 at 8. The evidence is completely unavailing, however, since regardless of its initial considerations, Bancorp ultimately executed the release. Second, plaintiff's then counsel also notes that he had rejected an earlier draft of the release, that differed somewhat from the version Bancorp ultimately executed. *See id.* ¶¶ 6-8. Having reviewed both versions, we agree that the earlier version differs from the one ultimately signed, but are unable to infer from the change that the parties intended to exclude plaintiff's claims against the receiver from the release's ambit.

[8] In certain circumstances, the statute of limitations for a claim of breach of fiduciary duty may be only three years, *see id.* at 741, though for purposes of this motion, we assume the longer period of six years applies.

Here, plaintiff's claims accrued in or about 1985, when the FDIC-R began to perform the acts upon which the claims are based. *See Plitman*, 990 F. Supp. at 337 (cause of action for unjust enrichment accrues "upon the occurrence of the wrongful act giving rise to the duty of restitution"); *Whitney Holdings*, 988 F. Supp. at 744 (claims governed by N.Y.C.P.L.R. § 213(7) accrue upon breach rather than upon plaintiff's discovery of the breach); *see also Snyder v. Town Insulation*, 599 N.Y.S.2d 515, 615 N.E.2d 999 (1993) ("accrual occurs when the claim becomes enforceable, *i.e.*, when all elements [] can be truthfully alleged in a complaint"); *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 599 N.Y.S.2d 501, (1993) (accrual occurs when "all of the elements necessary to maintain a lawsuit and obtain relief in court" exist). The HKSB transfer, for instance, was effected on June 26, 1985. *See* Def.'s 56.1 Stmnt ¶¶ 37-38. The legal fees at issue were incurred in connection with the declaratory judgment action, *see* Am. Compl. ¶¶ 47-51, which commenced in 1985 and concluded in 1987, *see* Widlitz Aff. Ex. 10. The asserted office expenditures, too, though their date is not specified either in the complaint or plaintiff's papers, apparently occurred early in the receivership. *See* Am. Compl. ¶¶ 53-54.

Even claims regarding the FDIC-R's payment of post-insolvency interest accrued before the 1989-90 period. Defendant has proffered evidence that the interest began to run upon the commencement of the receivership; that a substantial portion of the interest expense had been incurred by the year ending 1988; and that as of January 13, 1989, a total of $24 million in interest was projected to be incurred and paid. Def.'s 56.1 Stmnt ¶¶ 74-79; Widlitz Aff. Ex. 30 (Affidavit, with attachment, of Henry X. Moy, dated March 1989,

("Moy Aff.")).[9] Plaintiff has not proffered any evidence to the contrary and has failed to raise a genuine issue of material fact as to when its post-insolvency interest claim accrued. Any such claim would accordingly be untimely.

Bancorp's argument that its claims had not accrued until 1994 when the underlying facts were purportedly "revealed," *see* Pl.'s Mem. at 11, fails both as a matter of fact and law. As noted above, the claims accrued upon defendant's alleged, wrongful acts, when plaintiff could have alleged "all of the elements" of the claims and sought relief in court. *Ely-Cruikshank*, 81 N.Y.2d at 402; *see Whitney Holdings*, 988 F. Supp. at 743. Plaintiff's actual or constructive knowledge of the alleged breaches does not control. *See id.* More importantly, however, there is overwhelming, unrefuted evidence that Bancorp did actually know of all necessary facts in or about 1985, early in the Bank's receivership.[10] Plaintiff's attempt to equate its late discovery of "corroborative" evidence with its actual knowledge of the underlying facts, *see* Pl.'s Mem. at 11, is thus as unpersuasive as it is misguided.

Accordingly, as defendant has proffered substantial evidence that plaintiff's claims accrued more than six years

---

[9] It should be noted, however, that the FDIC-R did not actually pay post-insolvency interest until much later. The first such payment was on March 15, 1991 and the second on April 14, 1994. *See* Def.'s 56.1 Stmnt ¶ 69.

[10] *See, e.g.*, Def.'s 56.1 Stmnt ¶¶ 79-82 (evidence that Chuang had read the Moy Aff. in early 1989 and believed at the time the receivership's expenses to be unnecessary and unauthorized); Pl.'s 56.1 Stmnt ¶ 79 (stating, without further support, that the Moy Aff. had been perjurious).

prior to its complaint, and since plaintiff has failed to raise a genuine issue of fact, the latter's claims are time-barred.

CONCLUSION

Defendant's motion for summary judgment is granted, as plaintiff's claims are barred by the June 1988 release and are also untimely. The Clerk of the Court is directed to dismiss plaintiff's complaint with prejudice.

IT IS SO ORDERED.

DATED: New York, New York

June 15, 2000

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GOLDEN PACIFIC BANCORP, FOR ITS OWN ACCOUNT AND DERIVATIVELY ON BEHALF OF AND IN THE NAME OF GOLDEN PACIFIC NATIONAL BANK

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CORPORATE CAPACITY AND IN ITS CAPACITY AS RECEIVER FOR GOLDEN PACIFIC BANK,

Defendant.

95 Civ. 9281 (AGS) (HBP)

Ocotber 6, 1997

OPINION

ALLEN G. SCHWARTZ

UNITED STATES DISTRICT JUDGE

Before the Court is a Report and Recommendation (the "Report") of United States Magistrate Judge Henry Pitman dated July 31, 1997, recommending that the Court dismiss the complaint of Golden Pacific Bancorp for lack of subject matter jurisdiction. Having received the Report, plaintiff's objections to the Report, and defendant's response to the objections, and having conducted a de novo review of the record, the Court hereby rejects the Magistrate Judge's findings of fact and conclusions of law, and refers the matter back to the Magistrate Judge for further findings.

The Report first concludes that the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), bars this action. The FTCA makes the federal government amenable to suit in civil actions

> for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

If a claim is cognizable under the FTCA, then that statute provides the exclusive remedy.

In order to bring an action under the FTCA, a plaintiff must comply with procedures set out in 28 U.S.C. §§ 2671-80. More specifically, § 2675 mandates that before bringing a claim under the FTCA, a plaintiff must exhaust administrative remedies. The Report concludes that plaintiff's claims are cognizable under the FTCA, thus making it plaintiff's exclusive remedy, and that plaintiff has not exhausted its administrative remedies. The Report therefore concludes that this court lacks subject matter jurisdiction to entertain this action.

We reject both aspects of this conclusion: that regarding cognizability and that regarding exhaustion. First, we do not

find that plaintiff's claims[1] are cognizable under the FTCA, as we are not convinced that they sound in tort. Plaintiff is seeking not "money damages," but rather an equitable remedy. "A right of recovery for unjust enrichment is essentially equitable, . . ." 66 Am. Jur. 2d *Restitution & Implied Contracts § 3* (1973). *See also Corbin v. Federal Reserve Bank of NY*, 458 F. Supp. 143, 146 (S.D.N.Y. 1978) (holding, under circumstances very much like those of the instant case, that claims for unjust enrichment and breach of fiduciary duty are not claims for money damages and are not torts within the meaning of the FTCA). The cases cited in the Report are not to the contrary, as they merely state that breach of fiduciary duty may sometimes be considered a tort.

In regard to exhaustion, the Report finds that "Bancorp does not (and apparently cannot) allege that it has submitted its claims to the FDIC for administrative review." (R&R at 5.) This finding is erroneous. In the amended complaint, plaintiff states that it has exhausted all administrative remedies and refers to two exhibits which support that assertion (Am. Compl. ¶ 8): extensive objections to various aspects of the receivership, submitted by Bancorp to the FDIC (Exh. A) and the FDIC's lengthy response, rejecting the objections (Exh. B). Thus, if plaintiff's claims were cognizable under the FTCA, the exhaustion requirement would not be a bar to this action.

The Report next concludes that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, deprives us of jurisdiction. We disagree. The organic statute which created the FDIC provides that it may "sue and be sued, and com-

---

[1] Plaintiff alleges unjust enrichment, breach of fiduciary duty, and waste of corporate assets, and demands an accounting.

plain and defend, in any court of law or equity, State or Federal." 12 U.S.C. § 1819(a). The Supreme Court has held that such provisions are to be "liberally construed." *See F.D.I.C. v. Meyer*, 510 U.S. 471, 490 (1994). Meyer warns, however, that "sue and be sued" clauses may be limited by implication where a suit would not be consistent with the statutory or constitutional scheme. *Id.*

The Report correctly points to the APA as a possible implied limitation on our jurisdiction over the instant case. In enacting the APA, Congress explicitly disfavored judicial review of "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In general, the actions of banking regulators in managing bank affairs during a receivership are considered discretionary. *See United States v. Gaubert*, 499 U.S. 315, 325 (1991). The Report therefore concludes that "a broad construction of 28 U.S.C. § 1819(a) in this case would be inconsistent with Congress' clear intention to retain sovereign immunity for discretionary agency conduct." (R&R at 10.)

We would be tempted to accept this conclusion were it not for the specific allegations made in the amended complaint. On a motion to dismiss on the pleadings, "we must, of course, take as true the material facts alleged in [the] amended complaint." *Hospital Bldg. Co. v. Trustees of rex Hosp.*, 425 U.S. 738 (1976) We are "further required to view all allegations raised in the complaint in the light most favorable to the [plaintiff]." *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996).

The allegations in the amended complaint include the following: that only days after the closure of the bank, the FDIC disclosed that the bank had a surplus of $9 million (Am. Compl. ¶ 41), that despite having discovered that the bank was not insolvent, the FDIC nonetheless transferred its assets to Hong Kong Shanghai Bank ("HKSB") (Am. Compl. ¶ 44), that the payment which the FDIC accepted from

HKSB was far short of the true franchise value (Am. Compl. ¶ 56), and that the FDIC's claimed liquidation expenses were excessive, self-serving, and wasteful (Am. Compl. ¶¶ 63, 92).

If these allegations (and others contained in the amended complaint) are true, as we must at this point assume they are, then the FDIC's actions have gone beyond whatever unreviewable discretion Congress may have intended the FDIC to have. The Supreme Court has said that the discretionary action exception to the FTCA[2] "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz v. United States*, 486 U.S. 531, 537 (1988). That sentiment applies no less to the APA. If, in fact, the FDIC made a decision to proceed with the liquidation of a bank which it had discovered was solvent, and conducted that liquidation in a deliberately wasteful and self-serving manner, then those decisions do not fall into the category of "the permissible exercise of policy judgment" exempted from judicial review by Berkovitz. *Id.* at 539.

Having concluded that this court lacks subject matter jurisdiction over the instant case, the Report does not reach the other grounds asserted by the FDIC in support of its motion to dismiss. Because we reject the Report, we now address these other grounds. It would appear that these are collateral estoppel, failure to state a claim upon which relief may be granted, and statute of limitations. We address each in turn.

---

2 The exception provides that no liability shall lie for "any claim . . . based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion was abused." 28 U.S.C. § 2680(a).

First, the FDIC argues that plaintiff is collaterally estopped, based upon an earlier case decided by the United States Court of Appeals for the District of Columbia Circuit, from arguing that the bank was not insolvent when regulators shut it down. *See Golden Pacific Bancorp. v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988). We agree, not because the D.C. Circuit held that the bank was solvent, but rather because the court held that the Comptroller was acting in a discretionary manner when he made the decision. *See id.* at 512. We are therefore barred by the APA from reviewing the Comptroller's decision.

Our conclusion in this regard, however, does not support dismissal of the action. Plaintiff's claims regarding the FDIC's actions subsequent to the closure of the bank have not been litigated previously.[3] We find only that, should this matter proceed to trial, plaintiff may not assert that the bank was not insolvent at the point that regulators took it over.

The FDIC argues next that plaintiff has failed to state a claim upon which relief may be granted. It would appear that the FDIC does not believe that plaintiff has made out a prima facie case for unjust enrichment. The elements of an unjust enrichment claim under New York law are that (1) the defendant be enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances are such that in equity and

---

[3] A question may be raised as to whether plaintiff's remaining claims are barred because they should have been included in the earlier litigation. *See, e.g., Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981) (regarding res judicata). The answer to that question depends upon the state of plaintiff's knowledge at various points in time. We therefore must await further information from the Magistrate Judge before making this determination (*see infra*).

good conscience the defendant should return the money or property to the plaintiff. *See, e.g., Banca Commerciale Italiana v. Northern Trust Int'l Banking Corp.*, No. 95 Civ. 10700, 1997 WL 217591, at *9 (S.D.N.Y. Apr. 30, 1997).

The FDIC raises two points: that it only took interest to which it was statutorily entitled and that it had no duty to maximize shareholder return. Even if the FDIC is correct on both these points, these arguments do not answer plaintiff's two main contentions: that at some point after the closing, the FDIC must have become aware that the bank was actually solvent, but nonetheless proceeded with liquidation; and that the FDIC handled the liquidation in a manner which amounted to wrongful appropriation. If we accept plaintiff's allegations as true, as we must at this stage, then plaintiff has certainly stated a claim for unjust enrichment.

The FDIC's third argument for dismissal is that plaintiff's claims are time-barred. In New York, the statute of limitations for unjust enrichment is six years. N.Y. C.P.L.R. 213(1) (McKinney 1995). The bank was closed in 1985 and this suit was filed in 1995. Plaintiff alleges, however, that it was excluded from receiving any information about the receivership and the liquidation until it received a "Notice of Impending Termination" in May 1994. The FDIC does not deny that plaintiff did not receive notice of the details of the liquidation until that date, but rather points out that plaintiff must have known all along that, pursuant to statute, the FDIC was entitled to interest.

We find that neither party has briefed the statute of limitations issue adequately. The complaint, for instance, charges the FDIC with far more than drawing the interest to which it was arguably entitled, but the FDIC responds only in regard to interest. Furthermore, neither party has addressed the question of under what circumstances the statute of limitations may be tolled. We also have no concrete information as to the point at which plaintiff knew or should have known

that this cause of action had accrued, assuming that that was at an earlier date than May 1994.

In sum, the Court rejects the findings and conclusions in the Report and refers this matter back to Magistrate Judge Pitman for further findings and conclusions limited to defendant's motion to dismiss on the grounds of statute of limitations.

CONCLUSION

For the reasons set forth above, Magistrate Judge Pitman's Report is rejected. The matter is referred back for further findings and conclusions as detailed above.

SO ORDERED.

Dated: New York, New York

October 6, 1997

ALLEN G. SCHWARTZ, U.S.D.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of February two thousand five

PRESENT: 03-6194

Hon. Roger J. Miner, CJ
Hon. Reena Raggi, CJ
Hon. Victor Marrero, DJ

GOLDEN PACIFIC BANCORP, for its own account and derivatively on behalf of and in the name of Golden Pacific National Bank,

Plaintiff – Appellant

GOLDEN PACIFIC BANCORP,

Counter-Defendant – Appellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity and in its capacity as receiver for Golden Pacific National Bank,

Defendant – Appellee,

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Golden Pacific Bancorp. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/

Motion Staff Attorney

APPENDIX H

Form 905 (Rev. January 1987)

Department of the Treasury – Internal Revenue Service

Closing Agreement On Final Determination Covering Specific Matters

Under Section 7121 of the Internal Revenue Code Golden Pacific National Bank C/O FDIC As Receiver – 1100 Cornwall Road, Monmouth Junction, New Jersey, EIN: 13-2864124 and the Commissioner of the Internal Revenue make the following closing agreement:

WHEREAS, a dispute has arisen between the parties with respect to the taxpayer's federal income tax liabilities for its 1980 through 1988 taxable years;

WHEREAS, the taxpayer and the Internal Revenue Service, both recognizing the risk of litigation and the uncertainty as to the outcome of this tax dispute, agree to settle their tax dispute.

WHEREAS, the taxpayer and the Internal Revenue Service consent to the execution and delivery of this Closing Agreement solely to dispose of the pending tax dispute pertaining to the taxpayer's income tax liabilities for the taxable years 1980 through 1988.

WHEREAS, this consent is entered without the trial of any issue of fact or law.

NOW IT IS HEREBY DETERMINED AND AGREED for federal income tax purposes:

1. That the taxpayer ceased to do business by reason of insolvency within the meaning of I.R.C. § 7507(a) on June 25, 1985;

2. That there are outstanding deficiencies in income tax due from the taxpayer in the following amounts:

Year	Deficiency
1980	$ 1,297.00
1981	4,572.00
1982	91,500.00
1983	190,443.00
1984	631,397.00
1985	3,777,907.00
1986	3,042,050.00
1987	2,231,920.00
1988	1,759,659.00

3. That the above determined deficiencies reflect the extent to which any statement of tax was required pursuant to § 7507(a).

4. That, on the date this Closing Agreement is executed on behalf of the taxpayer, the individual executing this Closing Agreement on behalf of the taxpayer represents under penalties of perjury that there are outstanding claims for payment of the taxpayer's depositors.

5. That, on the date this Closing Agreement is executed on behalf of the taxpayer, collection of the deficiencies in income tax due from the taxpayer shall diminish the assets which are necessary for the full payment of the taxpayer's depositors' outstanding claims.

6. That the taxpayer shall promptly notify the Manhattan District Director of the termination of immunity under § 7507(a) in writing by certified mail as soon

as practicable after it appears that payment of the tax will not diminish the assets which are necessary for the full payment of the taxpayer's depositors' outstanding claims. The taxpayer shall attach a copy of this Closing Agreement to any such written notice.

7. That pursuant to § 7507(c), the income tax deficiencies which have been determined for the taxpayer's 1980 through 1988 taxable years, but which have not been assessed, collected or paid, or which have been abated pursuant to § 7507(a) and this Closing Agreement, shall be assessed or reassessed within the period of time allowed by § 7507(c)(4). Further, that the period of time allowed by § 7507(c)(4) shall not commence until the notification by certified mail required in paragraph 6 above, has been received by the Manhattan District Director.

8. That upon the application of § 7507(c), the taxpayer waives the restrictions contained in § 6213(a) prohibiting assessment and collection of the income tax deficiencies (plus statutory interest) for its 1980 through 1988 taxable years.

9. That the taxpayer hereby withdraws any pending income tax refund claims for the taxpayer's 1980 through 1988 taxable years and further agrees not to prosecute any income tax refund claims for these taxable years unless and until such time as § 7507(c)(2) authorizes the assessment or reassessment of the deficiencies determined herein.

This agreement is final and conclusive except:

(1) the matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of material fact;

(2) it is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exception for Code section 71221 notwithstanding any other law or rule of law; and

(3) if it relates to a tax period ending after the date of this agreement, it is subject to any law, enacted after the agreement date, that applies to that tax period.

By signing, the above parties certify that they have read and agreed to the terms of this document.

Your signature_____

Date Signed_____

Spouse's signature (if a joint return was filed)_____

Date Signed_____

Taxpayer's representative_____

Date Signed_____

Taxpayer (other than individual) FDIC as Receiver for "Golden Pacific National Bank"

By /s/ George Drapan

Date Signed 9/10/93

Title Regional Tax Accountant

Commissioner of Internal Revenue

By /s/ Edward H. Sullivan

Date Signed 10-7-93

Title Associate Chief, Appeals

APPENDIX I

As of 1985, 12 U.S.C. § 191 provided:

§ 191. General grounds for appointment of receiver

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.

As of 1985, 12 U.S.C. § 1821 provided, in relevant part:

§ 1821. Permanent Insurance Fund

. . .

(b) Liquidation as closing of bank

For the purposes of this chapter an insured bank shall be deemed to have been closed on account of inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors.

(c) Corporation as receiver

Notwithstanding any other provision of law, whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank . . .

hereafter closed, he shall appoint the Corporation receiver for such closed bank. . . .

(d) Powers and duties of Corporation as receiver

Notwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver to cause notice to be given . . . to all persons having claims against such closed bank pursuant to section 193 of this title; to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed national banks, except as herein otherwise provided. The Corporation as receiver shall pay to itself for its own account such portions of the amounts realized from such liquidation as it shall be entitled to receive on account of its subrogation to the claims of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them. . . . With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank . . . and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency.

. . .

(f) Payment if insured deposits

Whenever an insured bank . . . shall have been closed on account of inability to meet the demands of depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g) of this section either (1) by cash or (2) by making available to each depositor a transferred deposit in a

new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor . . . .

(g) Subrogation

In the case of a closed national bank, . . . the Corporation, upon payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. . . . In the case of any closed insured bank . . . , such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholder's liability as would have been payable to the depositor on a claim for the insured deposit . . . .

As of 1985, 26 U.S.C. § 7507 provided, in relevant part:

§ 7507. Exemption of insolvent banks from tax

(a) Assets in general

Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Secretary, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

. . .

(c) Refund; reassessment; statutes of limitation

(1) Any such tax collected shall be deemed to be erroneously collected, and shall be refunded subject to all provisions and limitations of law, so far as applicable, relating to the refunding of taxes.

(2) Any tax, the assessment, collection, or payment of which is barred under subsection (a), or any such tax which has been abated or remitted, shall be assessed or reassessed whenever it shall appear that payment of the tax will not diminish the assets as aforesaid.

. . .

(4) The running of the statute of limitations on the making of assessment and collection shall be suspended during, and for 90 days beyond, the period for which, pursuant to this section, assessment or collection may not be made, and a tax may be reassessed as provided in paragraphs (2) and (3) of this subsection and collected, during the time within which, had there been no abatement, collection might have been made.

FILED
OCT 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-36

In the Supreme Court of the United States

GOLDEN PACIFIC BANCORP, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM F. KROENER III
General Counsel
JACK D. SMITH
Deputy General Counsel
RICHARD A. ABOUSSIE
Associate General Counsel
COLLEEN J. BOLES
Senior Counsel
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC) was entitled to summary judgment on a state-law unjust-enrichment claim that the FDIC, acting as the receiver of an insolvent bank, improperly paid interest to itself in its capacity as subrogee of the bank's insured depositors, when the FDIC was legally entitled to receive such interest.

2. Whether a shareholder of an insolvent bank lacked standing to pursue a state-law corporate-waste claim against the FDIC, on the ground that the Internal Revenue Service had a superior claim of greater value against the bank's estate.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 14
FDIC v. *Citizens State Bank*, 130 F.2d 102 (8th Cir. 1942) 9
FDIC v. *Iowa Growthland Fin. Corp.*, 523 N.W.2d 591 (Iowa 1994) 9
FDIC v. *Rolden Fonseca*, 795 F.2d 1102 (1st Cir. 1986) 10
Herring v. *FDIC*, 82 F.3d 282 (9th Cir. 1995), cert. denied, 519 U.S. 1027 (1996) 15, 16
National Bank of the Commonwealth v. *Mechanics Nat'l Bank*, 94 U.S. 437 (1877) 9
New Orleans Pub. Serv. Inc. v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) 15
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 12
People v. *American Loan & Trust Co.*, 65 N.E. 200 (N.Y. 1902) 9
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 13
Wallis v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966) 12

Cases—Continued: Page

Youakim v. *Miller*, 425 U.S. 231 (1976) 18

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 14

Statutes and regulation:

National Bank Act, ch. 106, 13 Stat. 99 9

12 U.S.C. 194 13

12 U.S.C. 1821(d)(10)(C) 9

12 U.S.C. 1821(d)(11)(A) 13

12 U.S.C. 1821(f)(1) 2

12 U.S.C. 1821(g)(1) 8

26 U.S.C. 7507(a) 3

26 U.S.C. 7507(c) 3

12 C.F.R. 360.7 9

Miscellaneous:

55 *New York Jurisprudence* 2d (2002) 10

In the Supreme Court of the United States

No. 05-36

GOLDEN PACIFIC BANCORP, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 375 F.3d 196. The opinion and order of the district court granting respondent's renewed motion for summary judgment (Pet. App. 19a-35a), and the earlier opinion and order of the district court partially granting respondent's initial motion for summary judgment (Pet. App. 36a-72a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2004. A petition for rehearing was denied on February 2, 2005 (Pet. App. 113a-114a). On April 25, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 5, 2005, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owned more than 90% of the stock of Golden Pacific National Bank (Golden Pacific), a bank based in the Chinatown neighborhood of New York. In June 1985, the Office of the Comptroller of the Currency (OCC), the primary regulator for federally chartered banks, learned from an informant that Golden Pacific was involved in money laundering. After a brief investigation, the OCC determined that Golden Pacific was insolvent and ordered it to be closed. Golden Pacific's depositors were insured by the Federal Deposit Insurance Corporation (FDIC). Pursuant to federal law, the OCC appointed the FDIC as Golden Pacific's receiver. Pet. App. 37a, 74a; FDIC C.A. Br. 8-9.

As the insurer of Golden Pacific's depositors, the FDIC was obliged to make insurance payments "as soon as possible." 12 U.S.C. 1821(f)(1). In order to help fund those payments, the FDIC solicited bids from financially healthy banks to enter into a Deposit Insurance Transfer and Asset Purchase Agreement (DITAPA). Under a DITAPA, a healthy bank purchases certain assets from the insolvent bank at a premium, in return for which the FDIC allows the healthy bank to serve as the agent for the FDIC's insurance payments to the insolvent bank's depositors. The FDIC eventually entered into a DITAPA with the Hong Kong and Shanghai Banking Corporation (HKSB). By 1986, the FDIC (in its corporate capacity as insurer) had paid out over $140 million of its own funds to satisfy the claims of the insured depositors, mostly through HKSB. Pet. App. 4a, 39a.

Beginning in 1986, the FDIC, acting in its capacity as receiver, began repaying Golden Pacific's creditors. Upon making payments to Golden Pacific's insured depositors, the FDIC (in its corporate capacity) was subrogated to the depositors' claims against the bank. The FDIC therefore became Golden Pacific's largest creditor. By 1990, the FDIC, acting as receiver, had recovered and repaid all of the principal owed to Golden Pacific's creditors, including itself. Pet. App. 4a.

The FDIC thereafter began making interest payments to Golden Pacific's creditors. Applying New York's statutory judgment rate of 9%, the FDIC calculated that it was itself owed (in its corporate capacity) approximately $23 million in interest, and that the other creditors were owed approximately $2.8 million. Because insufficient assets remained to satisfy those claims, the FDIC paid itself approximately $11.2 million, and paid the other creditors approximately $1.4 million, on a *pro rata* basis. In 1995, after making its partial interest payments (and exhausting the remaining assets), the FDIC inactivated the receivership. Pet. App. 5a, 39a; FDIC C.A. Br. 14-15.

While the FDIC's receivership was ongoing, the Internal Revenue Service (IRS) informed the FDIC, in its capacity as Golden Pacific's receiver, of alleged tax deficiencies of the bank (or the bank's estate) for tax years 1980 through 1988. Although the IRS could not assess tax on, or collect tax from, Golden Pacific while it was insolvent, see 26 U.S.C. 7507(a), it could assess tax once it appeared that such an assessment would not diminish assets necessary for the full payment of the bank's depositors, see 26 U.S.C. 7507(c). In 1993, the IRS and the FDIC entered into an agreement concerning the IRS's claims. Pet. App. 115a-118a. In the agreement, the

FDIC acknowledged deficiencies in the amount of approximately $11.7 million. *Id.* at 116a. In return, the IRS recognized that Golden Pacific was insolvent. *Ibid.* The FDIC agreed to notify the IRS if it appeared that an assessment would not diminish assets necessary for the full payment of the bank's creditors (thereby triggering the IRS's authority to make such an assessment). *Id.* at 116a-117a. Because Golden Pacific had no remaining assets, the FDIC apparently never provided notification to the IRS, and the IRS never assessed Golden Pacific's tax deficiencies.

2. In 1995, petitioner filed suit against the FDIC in its capacities as Golden Pacific's insurer and receiver, pursuing claims of unjust enrichment, breach of fiduciary duty, and corporate waste under New York law. Pet. App. 5a, 78a. Petitioner primarily contended that the FDIC had acted improperly by liquidating Golden Pacific, notwithstanding evidence that it was in fact solvent; by using the allegedly more costly DITAPA method to do so; by awarding itself interest on its insurance payments; and by charging certain expenses to the receivership. *Id.* at 5a-6a.

The district court denied the FDIC's motion to dismiss for lack of subject-matter jurisdiction. Pet. App. 105a-112a. In doing so, however, the court determined that petitioner was estopped (as a result of earlier litigation) from arguing that the bank was not insolvent at the time the FDIC became receiver. *Id.* at 110a. The district court then granted the FDIC's motion for summary judgment, holding that petitioner's claims were barred by a release and also by the applicable statute of limitations. *Id.* at 91a-104a. The court of appeals, however, vacated that decision and remanded for further proceedings. *Id.* at 73a-90a.

3. On remand, the FDIC filed a motion for summary judgment on various other grounds. The district court partially granted the FDIC's motion, Pet. App. 36a-72a, and later granted the FDIC's renewed motion for summary judgment on the remainder of petitioner's claims, *id.* at 19a-35a.

a. In its initial opinion, the district court granted summary judgment to the FDIC on petitioner's unjust-enrichment claim insofar as it was based on the theory that the FDIC "was not entitled to interest on its payments to depositors because it did not properly obtain subrogation rights from [Golden Pacific's] prior creditors." Pet. App. 42a. The court reasoned that the FDIC was required to make payments to Golden Pacific's insured depositors once Golden Pacific was declared insolvent, and that it was "clear" that, once the FDIC made insurance payments to those depositors, it was subrogated to their rights. *Id.* at 45a. The district court noted that this Court had recognized that the creditor of an insolvent bank was entitled to receive post-insolvency interest, and that other courts had specifically recognized that the FDIC was entitled to receive post-insolvency interest when it had acted to fulfill insurance obligations. *Id.* at 46a-48a. On that basis, the court concluded that petitioner could not pursue an unjust-enrichment claim predicated on the FDIC's decision to pay itself interest. *Id.* at 48a-49a.[1] The district court also granted summary judgment on petitioner's unjust-enrichment claim insofar as it was based on the theory that the *rate* of interest used by the FDIC was excessive. *Id.* at 51a-52a. The court, however, declined to grant sum-

[1] The district court also granted summary judgment on petitioner's breach-of-fiduciary-duty and corporate-waste claims insofar as they were predicated on the same theory. Pet. App. 53a-54a, 57a.

mary judgment as to certain aspects of petitioner's corporate-waste claim. *Id.* at 61a, 64a-65a.

b. In its subsequent opinion, the district court granted summary judgment on petitioner's remaining claims (including the remainder of petitioner's corporate-waste claim) on the ground that petitioner "would not be entitled to any recovery and thus lacks standing to sue." Pet. App. 24a. The court noted that, if petitioner prevailed on its remaining claims, it would recover no more than $7.9 million. *Ibid.* Before petitioner could recover any of that money in its capacity as a shareholder, however, that money would have to be used to pay off (1) the remaining interest claims of Golden Pacific's creditors and (2) the approximately $11.7 million in tax deficiencies that would come due once the claims of Golden Pacific's depositors were satisfied. *Id.* at 24a-25a. The court noted that "[t]he claim of the IRS clearly has priority over the shareholders, who are only entitled to the proceeds remaining after all claims have been fully paid." *Id.* at 26a. "Because these outstanding debts exceed the $7.9 million in possible damages for [petitioner]," the court explained, "any recovery by [petitioner] is precluded." *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. As relevant here, the court of appeals first rejected petitioner's contention that the district court erred in granting summary judgment on petitioner's unjust-enrichment and breach-of-fiduciary-duty claims because "there [were] genuine issues of material fact as to whether the FDIC acted properly in awarding itself nine percent post-insolvency interest on the funds it had previously paid to cover its insurance obligations." Pet. App. 12a. The court noted that, under New York law, the elements of an unjust-enrichment claim are (1) that

the defendant was enriched at the plaintiff's expense and (2) that equity and good conscience required the plaintiff to recover the enrichment from the defendant. *Id.* at 13a n.8. The court of appeals observed that this Court has "long since recognized the general proposition that creditors to a liquidation are entitled to interest, just as any other judgment creditor, even absent specific statutory authorization." *Id.* at 13a. According to the court of appeals, "[i]t follows that the FDIC, as the depositors' subrogee, is entitled to post-insolvency interest." *Id.* at 14a.

The court of appeals then considered various other factors in determining that summary judgment on petitioner's claims relating to the FDIC's payment of interest was appropriate. The court first noted that "to hold otherwise would give [petitioner] the windfall of essentially an interest-free loan, and leave the FDIC with no compensation for the loss of the use of the funds it advanced." Pet. App. 14a. The court discounted the allegation that it was not the FDIC's ordinary practice to recover post-insolvency interest, noting that "internal agency practices do not create legal rights in third parties." *Id.* at 16a. Finally, the court also discounted the allegation that the FDIC's motive was to eliminate any excess funds that would otherwise be distributed to the IRS. *Id.* at 17a. Indeed, the court concluded that, insofar as petitioner had "acknowledged that none of the funds in question could have, under any scenario, been returned to it, no claim for unjust enrichment can lie." *Ibid.*

b. The court of appeals also agreed with the district court that petitioner lacked standing to pursue its corporate-waste claims. Pet. App. 17a-18a. The court noted that petitioner was seeking "approximately $8

million in claims of corporate waste (aside from its claims regarding the FDIC's interest)" and that petitioner "does not dispute that the receivership estate has senior outstanding credit obligations, including a tax liability of approximately $11.7 million." *Id.* at 17a. "Thus," the court reasoned, "even if [petitioner's] waste claims were meritorious, it would recover nothing," and petitioner lacked standing. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner first contends (Pet. 9-14) that the court of appeals improperly created a "federal rule of decision" in order to reject petitioner's state-law claim that the FDIC was unjustly enriched by paying itself interest in its capacity as subrogee of Golden Pacific's insured depositors. That contention lacks merit.

a. As a preliminary matter, petitioner does not challenge the court of appeals' conclusion that the FDIC was legally entitled to award itself interest on the more than $140 million in insurance payments that it had made, out of its own funds, to Golden Pacific's depositors. Pet. App. 4a, 39a.[2] Upon making those payments, the FDIC was "subrogated to all rights of the depositor against such institution or branch to the extent of such payment or assumption." 12 U.S.C. 1821(g)(1). As the court of appeals correctly noted (Pet. App. 13a), this Court has

---

[2] Petitioner errs in implying (Pet. 6, 7) that the FDIC did not advance its own funds in payment of the insurance claims. The district court determined that the FDIC "expended its own funds to fulfill its insurance obligation." Pet. App. 39a.

held that a depositor with a claim against an insolvent nationally chartered bank is entitled to collect interest on that claim in a liquidation under the National Bank Act. See *National Bank of the Commonwealth* v. *Mechanics' Nat'l Bank*, 94 U.S. 437, 439 (1877).[3] Consistent with that principle, lower courts have specifically held that the FDIC is entitled to receive interest on amounts it paid out in satisfaction of its statutory insurance obligations, in its capacity as subrogee of the insured depositors. See *FDIC* v. *Citizens State Bank*, 130 F.2d 102, 103-104 & n.6 (8th Cir. 1942); *FDIC* v. *Iowa Growthland Fin. Corp.*, 523 N.W.2d 591, 594-595 (Iowa 1994).

b. Petitioner contends (Pet. 12) that, even assuming that the FDIC was legally *entitled* to award itself interest on its insurance payments, petitioner could nevertheless pursue an unjust-enrichment claim against the

---

[3] A depositor in a bank chartered under New York law is similarly entitled to receive interest from the receiver, provided that all of the creditors have recovered their principal. See *People* v. *American Loan & Trust Co.*, 65 N.E. 200, 201 (N.Y. 1902). The court of appeals did not specifically address the question whether the right of a depositor in Golden Pacific to receive post-insolvency interest was supplied by federal or state law. Since the events at issue in this litigation, Congress has expressly authorized the FDIC to promulgate rules enabling it "to make payments of post insolvency interest to creditors holding proven claims against the receivership estates of insured Federal or State depository institutions" following satisfaction of the principal amounts of those claims (and to establish a uniform national rate for such interest payments), 12 U.S.C. 1821(d)(10)(C), and the FDIC has promulgated such rules, 12 C.F.R. 360.7. To the extent that the right to interest in this case was supplied by federal law, any state-law unjust-enrichment claim based on the FDIC's exercise of that right would arguably be preempted. The FDIC did not affirmatively argue below that petitioner's unjust-enrichment claim was preempted, however, and does not pursue that argument before this Court.

FDIC under New York law on the ground that it was "inequitable" for the FDIC to do so.[4] Petitioner claims that the court of appeals erred by adopting a "special federal rule of decision applicable to unjust enrichment claims against the FDIC," Pet. 14, under which "the FDIC's *legal* entitlement to certain payments operated to bar any *equitable* recovery by petitioner," Pet. 11. Petitioner is wrong in both respects.

In the first place, petitioner cites no authority for its assumption (Pet. 12) that, under New York law, a claimant's legal right to receive interest on its claims against a receivership estate would be trumped by a showing that "equity and good conscience" would lead to a different result. In New York, as elsewhere, "equity follows the law." 55 *New York Jurisprudence 2d* § 86, at 664 (2002). In particular, "[i]n the administration of assets equity does not interfere with absolute legal priority." *Id.* at 665. Thus, petitioner has not established that even the bright-line rule purportedly adopted by the court of appeals would have been inconsistent with New York law.

In any event, the court of appeals did not adopt any such bright-line federal rule of decision, but instead concluded only that, based on the circumstances of this

---

[4] To the extent that petitioner contends (Pet. 11, 13-14) that the FDIC (in its capacity as receiver) breached its fiduciary duty by paying itself interest (in its corporate capacity as insurer), that claim lacks merit. The payment of interest did not constitute "self-dealing" (Pet. 14), because (as courts have consistently held) the FDIC is treated as two separate entities when it acts in its capacities as receiver and insurer. See, *e.g.*, *FDIC* v. *Roldan Fonseca*, 795 F.2d 1102, 1109 (1st Cir. 1986). The necessary (and perverse) consequence of petitioner's position would be to require the FDIC affirmatively to *prefer* claims by other creditors to claims by the FDIC itself in its capacity as subrogee of insured depositors.

case, there were no "genuine issues of material fact" that precluded the FDIC from obtaining summary judgment on petitioner's state-law unjust-enrichment claim. Pet. App. 12a. At the outset of its analysis, the court listed the elements of an unjust-enrichment claim under New York law, including the requirement that a plaintiff must show that "equity and good conscience required the plaintiff to recover the enrichment from the defendant." *Id.* at 13a n.8. And while the court noted that the FDIC was legally entitled to award itself interest on its insurance payments, *id.* at 13a, the court did not stop there—as one would naturally expect if the court had adopted the bright-line rule that petitioner suggests. Instead, the court of appeals proceeded to consider the equities of the FDIC's decision to award itself interest, first noting that the awarding of interest was necessary to make the FDIC whole (and thus to protect the integrity of the FDIC's insurance fund), *id.* at 14a, and then discounting the allegation that it was not the FDIC's ordinary practice to recover post-insolvency interest, *id.* at 16a. Although the court did not conclude in so many words that the equities favored the FDIC,[5] the court did so implicitly in holding that the FDIC was entitled to summary judgment on petitioner's state-law unjust-enrichment claim. That portion of the court of

---

[5] Petitioner chastises the court of appeals (Pet. 12 n.4) for failing expressly to find that the FDIC's decision to pay itself interest "comported with principles of equity." It is hardly surprising, however, that the court of appeals did not make such a "finding," because petitioner did not even list (much less rely on) the elements of an unjust-enrichment claim in the relevant portions of its briefs in that court. See Pet. C.A. Br. 24-43; Pet. C.A. Reply Br. 1-14.

appeals' opinion therefore presents no question of federal law that warrants this Court's review.[6]

c. Petitioner also contends (Pet. 14 & n.5) that the court of appeals' decision conflicts both with this Court's "admonition" in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), that a court ordinarily may not adopt a federal rule of decision unless "there is a 'significant conflict between some federal policy or interest and the use of state law,'" *id.* at 87 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)), and with various decisions by lower courts applying state law to claims involving the FDIC. The decision below is not inconsistent with the decisions on which petitioner relies, however, for the simple reason that the court of appeals did not adopt a federal rule of decision, but instead merely applied state law. Because the relevant portion of the court of appeals' opinion presents no question of federal law, it *a fortiori* presents no conflict on a question of federal law that merits further review.

2. Petitioner next contends (Pet. 15-19) that the court of appeals erred by upholding the district court's decision to grant summary judgment on its state-law claim that the FDIC engaged in corporate waste, on the ground that petitioner lacked standing because the IRS had a superior claim of greater value against the bank's estate. That contention also lacks merit.

a. As an initial matter, petitioner implicitly concedes that, if the IRS had a valid claim against Golden Pa-

---

[6] Petitioner contends (Pet. 12 n.4) that the court of appeals could not have resolved its unjust-enrichment claim at the summary-judgment stage because "the equities of the FDIC's administration of the estate are the central disputed issue in the case." Petitioner, however, identifies no relevant dispute on a specific *factual* issue that would have precluded the court of appeals from entering summary judgment.

cific's estate, that claim would have had priority over any claim by petitioner in its capacity as shareholder. See, *e.g.*, 12 U.S.C. 194.[7] Petitioner likewise implicitly concedes that, if the IRS had a valid claim against the bank's estate whose value exceeded that of petitioner's corporate-waste claim, petitioner would lack constitutional standing because petitioner would be unable to demonstrate that it had suffered injury in fact from the alleged waste. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (defining an "injury in fact" as "a harm that is both concrete and actual or imminent, not conjectural or hypothetical" (internal quotation marks omitted)).

Petitioner instead makes the fact-bound contention (Pet. 16-17) that, notwithstanding the facts that the IRS had determined that Golden Pacific had tax deficiencies and that the FDIC, in its capacity as receiver, had acknowledged that those deficiencies amounted to approximately $11.7 million, the IRS did not have a valid claim for that amount—either because the IRS had not yet formally assessed those deficiencies (since it was precluded by statute from doing so until it appeared that there were remaining assets in the estate), or because the value of the IRS's claim would remain uncertain until the IRS made such an assessment. Even if it had been properly preserved, that fact-bound question would not warrant further review. But petitioner failed to challenge the validity or value of the IRS's claim against the bank's estate before the court of appeals, instead

---

[7] In 1993, Congress enacted the national depositor preference statute, which gives priority to claims by the FDIC and depositors over other creditors but reaffirms the preexisting principle that all other claims have priority over claims by shareholders. See 12 U.S.C. 1821(d)(11)(A).

arguing only that the FDIC should be estopped from relying on the IRS's claim because the IRS had disagreed with the OCC's determination that Golden Pacific was *insolvent*. Pet. C.A. Br. 44 n.23; Pet. C.A. Reply Br. 15.[8] This Court's practice is not to consider questions that were neither pressed nor passed upon below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioner also suggests (Pet. 15) that the court of appeals erred by "implicitly" treating the outstanding portion of the FDIC's claim for interest as superior to petitioner's corporate-waste claim, notwithstanding the fact that petitioner was separately contesting the validity of the FDIC's claim. The court of appeals, however, merely noted that "[petitioner] does not dispute that the receivership estate has senior outstanding credit obligations, *including* a tax liability of approximately $11.7 million." Pet. App. 17a (emphasis added). To the extent that the court of appeals suggested that the estate had other superior obligations besides the IRS's claim, that suggestion was indisputably correct insofar as *other* creditors besides the FDIC had outstanding interest

---

[8] Petitioner suggests (Pet. 18) that it had claimed that the FDIC's agreement with the IRS, in which it conceded the amount of the tax deficiencies, itself constituted a "fiduciary breach," and that the court of appeals, by holding that petitioner lacked standing on its corporate-waste claim, "essentially granted a default judgment to the FDIC on the principal point of contention." In its complaint, however, petitioner nowhere alleged that the FDIC breached its fiduciary duty by acknowledging that Golden Pacific had outstanding tax liabilities in the amount of approximately $11.7 million—nor, in fact, did petitioner so much as refer to the agreement between the FDIC and the IRS. See, *e.g.*, First Am. Compl. paras. 86-89 (breach-of-fiduciary-duty claim).

claims against the estate—claims whose validity petitioner does not contest. In any event, because the court of appeals determined that the value of the IRS's claim exceeds the value of petitioner's corporate-waste claim, the court of appeals would have concluded that petitioner lacked constitutional standing regardless of the existence of other superior claims.[9]

b. Petitioner asserts that the court of appeals' decision "cannot be reconciled * * * with the federal courts' 'virtually unflagging' obligation to adjudicate cases on their merits." Pet. 19 (quoting *New Orleans Pub. Serv. Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*)). The court of appeals' decision, however, is entirely consistent with the settled principle (which *NOPSI* does not address) that federal courts lack jurisdiction to consider claims brought by plaintiffs who have failed to demonstrate injury in fact. And although petitioner makes the fact-bound contention that the IRS did not have a valid superior claim, it seemingly concedes that the court of appeals' decision is otherwise consistent with the Ninth Circuit's decision in *Herring* v. *FDIC*, 82 F.3d 282 (1995), cert. denied, 519

---

[9] In a footnote, petitioner suggests (Pet. 18 n.9) that its corporate-waste claim against the FDIC was worth more than the $7.9 million suggested by the court of appeals, because it also included the approximately $11.2 million in post-insolvency interest that the FDIC paid to itself. Before the court of appeals, however, petitioner conceded that its corporate-waste claim was worth only $7.9 million. See, *e.g.*, Pet. C.A. Br. 45 (referring to "[petitioner's] claim for repayment of $7.9 million); Pet. C.A. Reply Br. 14 (referring to "[petitioner's] $7.9 million corporate waste claim"). Although petitioner originally asserted a corporate-waste claim based on the FDIC's decision to pay itself interest, petitioner apparently did not pursue that claim before the court of appeals, see Pet. App. 12a-13a, and does not pursue that claim before this Court, see Pet. 9-14.

U.S. 1027 (1996), which held that a plaintiff lacks standing to bring a state-law claim against the FDIC in its capacity as receiver if other creditors possess superior claims of greater value against the bank's estate. *Id.* at 285. As with petitioner's unjust-enrichment claim, therefore, petitioner identifies no conflict concerning its corporate-waste claim that merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WILLIAM F. KROENER III
General Counsel
JACK D. SMITH
Deputy General Counsel
RICHARD A. ABOUSSIE
Associate General Counsel
COLLEEN J. BOLES
Senior Counsel
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation

OCTOBER 2005

Supreme Court, U.S.
FILED
OCT 19 2005
OFFICE OF THE CLERK

No 05-36

IN THE

Supreme Court of the United States

GOLDEN PACIFIC BANCORP,

Petitioner,

v

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

THEODORE B. OLSON
MARK A. PERRY
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The FDIC's Assertion That The Court of Appeals "Applied State Law" Is Completely Belied By The Decision Below 3

II. By Acknowledging That The IRS Has Made No Assessment On Petitioner, The FDIC All But Confesses Error On The Standing Question 7

III. This Case Warrants This Court's Review 9

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 9

Bank of Tokyo Trust Co. v. Urban Food Malls Ltd., 650 N.Y.S.2d 654 (App. Div. 1996) 1

Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003) 5

Clarry v. United States, 85 F.3d 1041 (2d Cir. 1996) 6

FDIC v. Hurwitz, 384 F. Supp. 2d 1039 (S.D. Tex. 2005) 9

Herring v. FDIC, 82 F.3d 282 (9th Cir. 1995) 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine, 634 N.Y.S.2d 469 (App. Div. 1995) 4

Mosser v. Darrow, 341 U.S. 267 (1951) 10

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 1, 5, 6, 7

Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974) 7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 8

Youakim v. Miller, 425 U.S. 231 (1976) 8, 9

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 9

STATUTES

12 U.S.C. § 1821(g) 4

12 U.S.C. § 194 ..... 1, 6

OTHER AUTHORITIES

55 NY JUR. EQUITY 2d (2002) 3, 4

REPLY BRIEF FOR PETITIONER

The FDIC's brief in opposition is striking in that it fails even to acknowledge the existence of its state-law fiduciary duty, when acting as a receiver, to husband the assets of the receivership estate, *see Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 650 N.Y.S.2d 654, 665 (App. Div. 1996), and its concurrent duty, under federal law, to "pa[y] over to the shareholders," any "remainder of the proceeds," 12 U.S.C. § 194 (2005). The omission is telling because it demonstrates that, even today, the FDIC does not take seriously those obligations. That is the point of this petition.

No less than any other receiver, the FDIC has obligations that accompany its rights. Inasmuch as those fiduciary duties arise exclusively from state law, state law is the primary, if not the only, vehicle by which a shareholder or creditor can vindicate their performance. The decision below, however, renders state law of fiduciary duty ineffectual—powerless to govern the conduct of a federal receiver—and replaces it with a federal rule that effectively entitles a federal receiver to do as it pleases. That decision contravenes the Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and effectively eliminates state-law regulation of federal receivers. This Court's review is warranted.

* * *

The FDIC does not dispute that in 1990, after nearly five years of gross mismanagement by the FDIC receiver, and after all depositors and creditors had been paid in full, Golden Pacific National Bank ("Bank") still held net assets of more than $15 million. *See* Pet. 2-3. Under federal law, the FDIC should have terminated its receivership at that time and paid the remaining funds to the Bank's shareholders. *See* 12 U.S.C. § 194. Instead, the FDIC did not "inactivate[]" the receivership until another five years had passed. Opp. 3. The only thing the FDIC did during those five years is expropriate to itself the $15 million of assets that rightfully be-

longs to the Bank's shareholders. It accomplished this principally by reimbursing itself exorbitant expenses (including $1.94 million for salaries in 1994—and for what?) and paying itself more than $11 million in "interest."

Petitioner sued the FDIC, alleging egregious breaches of the FDIC's fiduciary duties to the Bank's shareholders. Its complaint raised state-law causes of action in equity for unjust enrichment and corporate waste. The district court gave petitioner's claims the back of its hand. It granted summary judgment on petitioner's unjust enrichment claim on the basis that the FDIC had legal authority to pay itself post-insolvency interest, ignoring the fact that the FDIC could have used (and indeed, as a fiduciary, was required to use) the Bank's assets to pay the depositors (thereby accruing no interest expense) and the uncontroverted evidence that the FDIC had never previously exercised this ostensible authority. Pet. App. 48a-49a. On the corporate waste claim, the district court reached the improbable conclusion that the allegation of waste of at least $8 million was insufficient to state an injury in fact. *Id.* 30a. The court found that petitioner's corporate waste claim had been eclipsed by a phony $11.7 million tax claim manufactured by an agreement between the FDIC and the Internal Revenue Service. *Id.* 24a-25a. The court of appeals affirmed the grant of summary judgment on both claims without stating additional or alternative grounds. *Id.* 12a-18a.

The courts below thus never adjudicated petitioner's claims on the state-law equitable terms on which they were premised. In so doing, they contravened decisions of this Court and severely constricted the remedies available to shareholders when a federal receiver violates the fiduciary duties imposed by state law. This case warrants this Court's review.

I. The FDIC's Assertion That The Court of Appeals "Applied State Law" Is Completely Belied By The Decision Below

The FDIC asserts that the courts below "did not adopt a federal rule of decision, but instead merely applied state law" in rejecting Golden Pacific's equitable claim for unjust enrichment. Opp. 12. In support of this assertion, the FDIC contends that (1) "equity follows the law," Opp. 10 (quoting 55 NY JUR. EQUITY 2d § 86, at 664 (2002)), and (2) the court of appeals considered all the relevant equitable factors in any event and "implicitly" concluded that "the equities favored the FDIC," *id.* at 11. The FDIC's argument is supported only by moonbeams; it grossly distorts both New York principles of equity and the decisions below.

1. Equity does not, as the FDIC would have it, merely "follow the law." Indeed, if the FDIC were right, there would be no need for the treatise on New York principles of equity that it cites as authority to this Court. As that treatise states, though, "[w]hile equity follows the law, it does not do so at all times or in craven dependence upon the law." 55 NY JUR. EQUITY 2d § 86, at 664. Insofar as "[t]he overwhelming command of the law in a proceeding in equity is to do justice," *id.* § 84, at 662, "[e]quity will not allow the rigid rules of law to work an injustice," and will "depart from the rules of law which stand as a barrier to the accomplishment of equity." *Id.* § 86, at 664.

The equitable action for unjust enrichment thus empowers courts to look past "rigid rules of law" to correct injustice. *See id.* § 69, at 649 ("Equity may be impelled to action through any of its formulas of expression where . . . unjust enrichment [may have been] achieved"). Therefore, notwithstanding any legal entitlement the FDIC may have had to pay itself interest on outlays (if any) it incurred to cover insured deposits, if petitioner can demonstrate that those payments unjustly enriched the FDIC—*i.e.*, that those payments offended "equity and good conscience"—then petitioner is entitled to restitution of those interest payments. *See id.* § 100,

at 679 ("A cause of action for unjust enrichment requires the court to determine whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered") (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine*, 634 N.Y.S.2d 469 (App. Div. 1995)). The courts below overlooked this fundamental principle of equity, to which the FDIC has no answer other than misdirection.

2. The notion that the court of appeals "consider[ed] the equities of the FDIC's decision to award itself interest," and "implicitly" concluded that "the equities favored the FDIC" (Opp. 11) is the product of wishful thinking rather than any plausible reading of the decisions below. In granting summary judgment to the FDIC on petitioner's claim for unjust enrichment, the district court reasoned that "the *only* . . . question is whether interest payments are among the 'rights of the depositor' [subrogated to the FDIC] under the language of 12 U.S.C. § 1821(g) and thus whether the FDIC-C was entitled to interest." Pet. App. 45a (emphasis added). Having concluded *only* that interest payments are not precluded by the statute, the district court then held that the "FDIC is entitled to that payment of interest on the funds that it extends when it is subrogated to the rights of depositors." *Id.* 49a. Nowhere in the district court's discussion of petitioner's unjust enrichment claim is there an analysis of the defendant's conduct—required under New York law—to determine whether equity and good conscience nevertheless demanded that the FDIC's decision to pay itself interest, *regardless* of statutory entitlement, be set aside. Nor could there be. The district court granted summary judgment on the unjust enrichment claim. Any discussion of the equities necessarily would have raised disputed issues of fact such as whether the FDIC actually expended any of its own funds to settle the claims of the Bank's insured deposits, and, if so, whether the FDIC used its funds instead of the Bank's assets in order to manufacture a claim for post-insolvency interest and deny the shareholders a recovery.

It is obvious enough from the text of its decision that the court of appeals did not, as the FDIC now suggests, under-

take even an "implicit[]" analysis of the equities involved in petitioner's unjust enrichment claim. Opp. 11. This is not one of the rare cases in which the court of appeals invoked its power to affirm summary judgment on a basis fairly found in the record but nevertheless different from that incanted by the district court. *See, e.g., Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 90 (2d Cir. 2003). In reviewing the grant of summary judgment, rather than asking whether the district court correctly concluded that there was no issue of material fact as to whether equity and good conscience permitted the payment of post-insolvency interest, the court of appeals (just as the district court had done) addressed only "whether the FDIC, as subrogee to the claims of a failed bank's FDIC-insured depositors, may collect post-insolvency interest on those claims from the failed bank's estate." Pet. App. 2a-3a. The court of appeals concluded that "such interest payments are not improper," not because equity and good conscience permitted the payments, but rather because of the "statutory scheme" and "the general proposition that creditors to a liquidation are entitled to interest." Pet. App. 13a. From these *legal* precepts, the court of appeals concluded, "[i]t follows that the FDIC . . . is entitled to post-insolvency interest." Pet. App. 14a.

The FDIC contends, though, that the court of appeals "did not stop there" but rather went on, after reaching its holding also to "consider the equities of the FDIC's decision to award itself interest." Opp. 11. That contention is refuted by the court of appeals' opinion itself. The FDIC first points to the sentence immediately after the holding, which states that a contrary holding "would give Bancorp the windfall of essentially an interest-free loan, and leave the FDIC with no compensation for the loss of the use of the funds it advanced." Pet. App. 14a; *but cf. O'Melveny & Myers*, 512 U.S. at 88 ("Our cases have previously rejected 'more money' arguments remarkably similar to the one made [by the FDIC] here."). Far from analyzing petitioner's equitable claim, this sentence merely reflects the fact that it had already been rejected. The return of post-insolvency interest to

petitioner would constitute a "windfall" only if the payment of post-insolvency interest itself was just. It is also premised on a disputed fact (*i.e.*, whether the FDIC actually expended any funds) and is contravened by the federal statute that *requires* the FDIC to pay the shareholders "any proceeds" after the liquidation—windfall or no. 12 U.S.C. § 194.

Other than the stray "windfall" reference, the FDIC points only to the court of appeals' dismissal of petitioner's undisputed evidence that the FDIC had previously followed an unbroken practice of *not* charging post-insolvency interest. The court of appeals found this undisputed evidence inconsequential, though, not because (as the FDIC suggests) it was outweighed by the countervailing equitable factors, but rather because "internal agency practices do not create legal rights in third parties." Pet. App. 16a (citing *Clarry v. United States*, 85 F.3d 1041, 1048 (2d Cir. 1996)). Of course, petitioner did not claim that the agency practice established a *legal* right to the return of the interest payments. Petitioner presented the evidence of the agency's practice to demonstrate that the unprecedented interest payments were, in these circumstances, *inequitable*. The court of appeals thus disposed of petitioner's equitable unjust enrichment claim without any reference to state-law principles of equity.

3. Nowhere in its brief in opposition does the FDIC take issue with petitioner's contention that if the court of appeals adopted a federal rule of decision to resolve petitioner's equitable state-law claims, the decision of the court of appeals would contravene this Court's decision in *O'Melveny & Myers*, 512 U.S. at 87, and accordingly warrant review by this Court. Instead, notwithstanding the failure of both courts below to engage in any meaningful analysis of the equities presented by petitioner's claim for unjust enrichment, the FDIC quixotically clings to the notion that the courts below "merely applied state law," Opp. 12. As demonstrated above, however, this is transparently not the case. The reliance of the courts below on the FDIC's legal entitlement to post-insolvency interest to reject petitioner's equitable claim for unjust enrichment amounts to a special federal common-

law rule of decision for state-law equitable claims against federal receivers. The application of this new rule for federal receivers threatens to displace New York law of unjust enrichment, just as in *O'Melveny & Myers*, where the FDIC's suggested federal common-law rule sought to displace California's law concerning imputation of knowledge.

II. By Acknowledging That The IRS Has Made No Assessment On Petitioner, The FDIC All But Confesses Error On The Standing Question

The FDIC maintains that petitioner lacked standing to prosecute its claim against the FDIC for corporate waste "because the IRS had a superior claim of greater value against the bank's estate." Opp. 12. According to the FDIC (and the court of appeals), the existence of the IRS tax claim means that petitioner cannot "demonstrate that it had suffered injury in fact from the alleged waste." *Id.* 13. This is plainly wrong, and indeed, the FDIC concedes as much in its brief in opposition.

The FDIC does not dispute that it is only the act of assessment that creates a tax liability. *See* Pet. 17 (citing, *inter alia*, *Rambo v. United States*, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974)). The FDIC also concedes that, to date, "the IRS has never assessed Golden Pacific's tax deficiencies." Opp. 4. In the absence of the assessment, there can be no liability to the government—no "superior claim of greater value"—that would deprive petitioner of standing to bring its claim for corporate waste. Far from a "fact-bound contention" (Opp. 15), the absence of a tax liability to the IRS is conceded by the FDIC. Accordingly, the closing agreement between the FDIC and the IRS presents no obstacle to petitioner's Article III standing to bring its corporate waste claims against the FDIC.*

---

* The Ninth Circuit's decision in *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995), is thus easily distinguished. In *Herring*, the court of appeals concluded that the FDIC had a claim superior to that of the shareholders only after concluding that "the shareholders have no chance of recovering

Notwithstanding the manifest errors of the courts below, the FDIC lacks even the good grace to consent to a remand. Instead, desperate to preserve its favorable result and avoid adjudication of the merits of petitioner's claims, the FDIC now argues that this Court should decline review of the question because it was not "properly preserved" and "[t]his Court's practice is not to consider questions that were neither pressed nor passed upon below." Opp. 13, 14 (citing, *inter alia*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam)). This outlandishly obstreperous argument is only the latest example of inequitable conduct by the FDIC in its dealings with petitioner.

First, the FDIC's reliance on this prudential maxim is badly misplaced here, where the question concerns standing. This Court not only has the authority, but the obligation to review questions implicating its jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." (internal quotation marks omitted)).

More fundamentally, though, the notion that petitioner did not allege an injury in fact, or that the courts below did not pass upon the FDIC's objections to petitioner's Article III standing, is completely absurd. From the beginning of the litigation, petitioner alleged that it had been injured by the FDIC's waste of the Bank's corporate assets. The FDIC first raised the IRS closing agreement to contest petitioner's standing eight years later, and successfully convinced the courts below of the merit of its position. Having prevailed on its late-blooming jurisdictional argument, the FDIC can-

---

[Footnote continued from previous page]

on their underlying claim." *Id.* at 285. In this case, far from demonstrating the validity of the IRS claim, the FDIC has conceded its non-existence.

not now be heard to argue that the courts below somehow failed to pass upon it.†

III. This Case Warrants This Court's Review

As demonstrated in the petition and further demonstrated above, the decision of the court of appeals is manifestly incorrect on both questions presented and conflicts with decisions of this Court. That alone is a fully sufficient basis for further review. Perhaps more importantly, though, this case presents the Court with an opportunity to rein in an agency that, at least for a period of time in the 1980's and 1990's, had thoroughly run amok, routinely flouting federal and state authority. *See, e.g., FDIC v. Hurwitz*, 384 F. Supp. 2d 1039 (S.D. Tex. 2005) (awarding $72 million in attorneys' fees as sanction for FDIC's litigation misconduct). An equitable action for breach of fiduciary duty is the only recourse shareholders have to guard against most acts of misfeasance or malfeasance perpetrated by a receiver. If what is equitable is delimited only by the receiver's power and authority, the re-

---

† That petitioner might not have identified in the courts below all of the many legal infirmities in the FDIC's standing argument is of no consequence. As the cases cited by the FDIC indicate, to preserve an argument for appellate review, a litigant is not required to present in the courts below every authority in support of its position, or every flaw in every argument of the opposition; this Court finds questions to be unpreserved for review only when a litigant fails to raise or the court below fails to decide the underlying substantive claim or defense—not a particular authority or argument in support. *See, e.g., Youakim*, 425 U.S. at 234 (acknowledging maxim, but considering a Supremacy Clause argument raised for the first time on certiorari in any event, finding the question to be exceptionally important); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider a question raised in a petition, where petitioner had attempted to bring the claim via an amended complaint and the amendment had been rejected as untimely). *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), does not even remotely stand for the proposition for which the FDIC cites it. *See* Opp. 14. *Zobrest* examined the canon of constitutional avoidance—and found it inapplicable on the facts of that case. *Id.* at 8.

ceiver's fiduciary duties would be reduced to obedience to law *simpliciter*. Such would be the consequence of allowing the decision below to stand; yet this would work a fundamental change in the fiduciary obligations of receivers. *See, e.g., Mosser v. Darrow*, 341 U.S. 267, 271 (1951). Adherence to the traditional view mandates review, and reversal, of the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
MARK A. PERRY
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

October 19, 2005